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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

VICTOR R. VERMEULEN, M.D., and
VICTOR R. VERMEULEN, M.D., INC.,
Petitioners,

vs.

CARL E. HARDY, M.D.,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT**

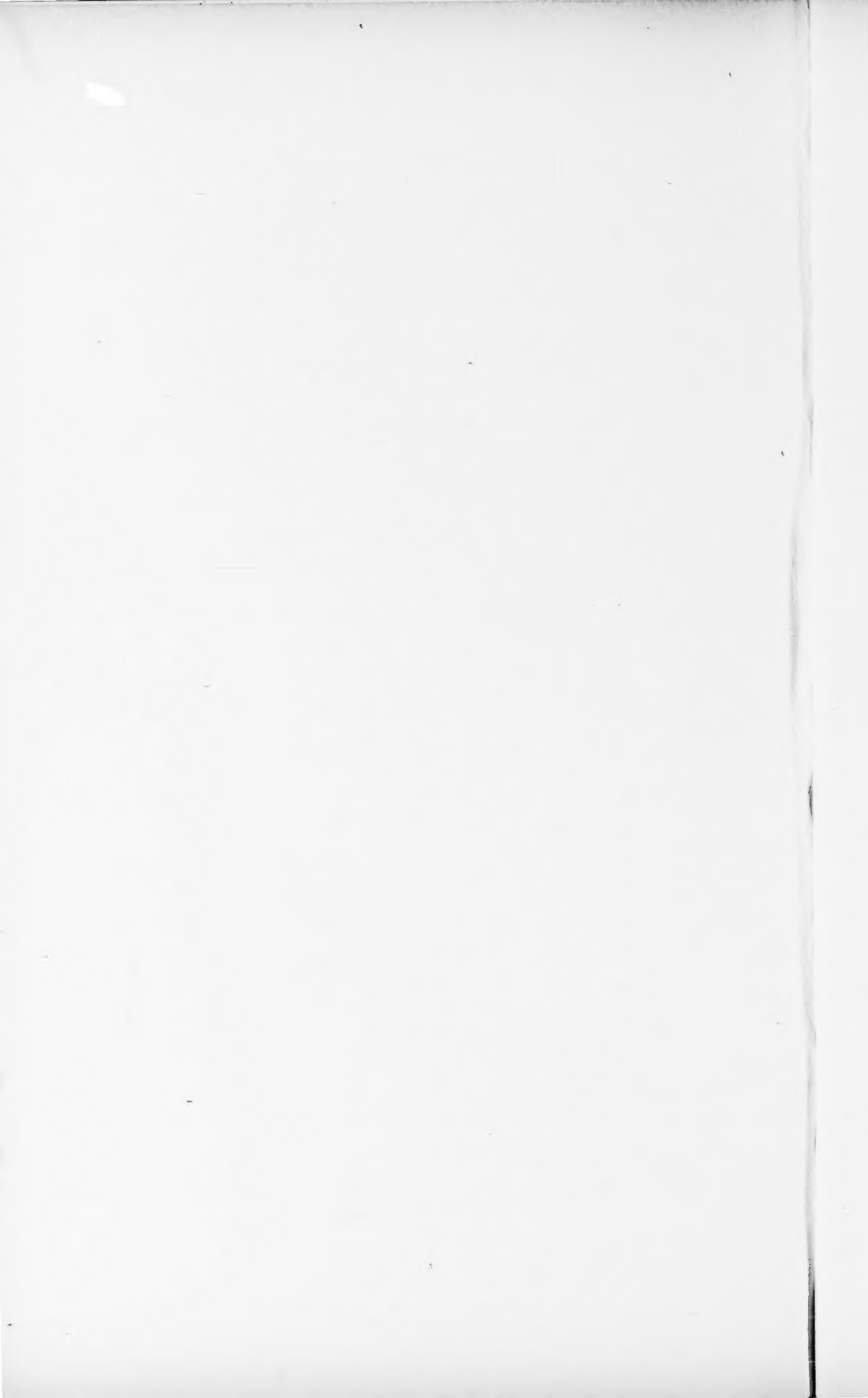
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QUESTIONS PRESENTED

1. Whether the decision of the Ohio Supreme Court retroactively depriving petitioner of a vested right created by the expiration in 1975 of a one year statute of limitations, denies petitioner due process of law?

2. Whether the decision of the Ohio Supreme Court retroactively depriving petitioner of a vested right created by the expiration in 1978 of a four year statute of repose, denies petitioner due process of law?

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**PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT**

Petitioners, Victor R. VerMeulen, M.D., and Victor R. VerMeulen, M.D., Inc. petition for a writ of certiorari to review the judgment and opinion of the Ohio Supreme Court in this case.

OPINIONS BELOW

The judgment of the Ohio Supreme Court (Appendix, *infra*, 1a-19a) is reported at 32 Ohio St. 3d 45, 512 N.E.2d 626. The opinion of the Ohio Tenth Appellate District (Appendix, *infra*, 20a-29a) is unreported. No. 85-AP-1087, slip op. (Ohio 10th App. Dist., June 30, 1986).

JURISDICTION

The opinion of the Ohio Supreme Court was entered on August 12, 1987. A Motion for Rehearing was timely filed with that court on August 24, 1987. The Motion for Rehearing was denied on October 7, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

... nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

U.S. CONST. amend. XIV, § 1.

Ohio Rev. Code § 2305.11 provides in pertinent part:

(A) An action for libel, slander, malicious prosecution, false imprisonment, or malpractice, including an action for malpractice against a physician, podiatrist, hospital, or dentist . . . shall be brought within one year after the cause thereof accrued

(B) In no event shall any medical claim against a physician, podiatrist, or a hospital or a dental claim against a dentist be brought more than four years after the act or omission constituting the alleged malpractice occurred

STATEMENT OF THE CASE

This case was originally filed by plaintiff Carl E. Hardy, M.D. (hereinafter "plaintiff") in the Common Pleas Court of Franklin County, Ohio, on October 1, 1985. The action is based upon alleged acts of medical malpractice which occurred in 1973 and 1974. The Common Pleas Court granted a Motion to Dismiss filed by defendants Victor R. VerMeulen, M.D., et al. (hereinafter "Dr. VerMeulen"), pursuant to Rule 12(C) of the Ohio Rules of Civil Procedure. The basis of the Motion to Dismiss was that plaintiff's claims were barred by the applicable statute of limitations, which provided that a cause of action for medical malpractice must be brought within one year after the termination of the patient-physician relationship.

Plaintiff appealed the dismissal of his complaint to the Court of Appeals for the Ohio Tenth Appellate District. The Court of Appeals unanimously affirmed the decision of the Common Pleas Court.

Thereafter, the Ohio Supreme Court granted review, and in its decision rendered on August 12, 1987, reversed the decision of the lower courts.

In order to reverse the lower courts and to permit plaintiff an opportunity to recover damages from Dr. VerMeulen, the Court had to find both the one year statute of limitations in Ohio Rev. Code § 2305.11(A) and the four year statute of repose in Ohio Rev. Code § 2305.11(B) inapplicable to plaintiff's claim.

With regard to the one year statute of limitations, Ohio law at the time the medical services were rendered was that a malpractice action was barred one year after the termination of the patient-physician relationship ("Termination Rule"). Approximately nine years after the medical services in this case the Ohio Supreme Court abandoned the Termination Rule and adopted a new interpretation of the one year statute of limitations known as the "Discovery Rule."

In this case, the Ohio Supreme Court retroactively applied the Discovery Rule to plaintiff's claim, thereby rendering the one year statute of limitations inoperative. This decision, as we shall demonstrate, resulted in a denial of due process to Dr. VerMeulen.

The Ohio Supreme Court was still confronted with the four year statute of repose in Ohio Rev. Code § 2305.11(B). In order to avoid the effect of this statute of repose, the Court held it to be unconstitutional. This aspect of the decision also denied Dr. VerMeulen due process of law.

Dr. VerMeulen filed a Motion for Rehearing in the Ohio Supreme Court, which was denied on October 7, 1987. In his motion for a rehearing, Dr. VerMeulen urged that he had a vested right in the statutory provisions that barred plaintiff's claim, and that the decision of the Ohio Supreme Court that had removed the two separate bars, the one year statute of limitations and the four year statute of repose, was a violation of his right to due process of law under the United States Constitution and the Ohio Constitution.

STATEMENT OF FACTS

In early 1973, plaintiff sought medical care and treatment from Dr. VerMeulen, who is an otolaryngologist. Dr. VerMeulen treated plaintiff for hearing loss in plaintiff's right ear throughout the remainder of 1973 and into early 1974. During the course of the patient-physician relationship, Dr. VerMeulen performed three surgical procedures, known as stapedectomies, on plaintiff's ear.

It is an uncontroverted fact in this litigation that the patient-physician relationship terminated in early 1974. However, plaintiff claims that he did not "discover" his alleged injury until April 15, 1984, approximately ten years after he was last treated by Dr. VerMeulen.

ARGUMENT

This case is premised upon plaintiff's claim that Dr. VerMeulen committed medical malpractice in the course of his professional relationship with plaintiff. In his motion to dismiss plaintiff's complaint, Dr. VerMeulen raised the affirmative defense that the applicable Ohio statute of limitations, Ohio Rev. Code § 2305.11, barred plaintiff's claims.

Since July 28, 1975, Ohio Rev. Code § 2305.11 has contained two separate and distinct limitation provisions applicable to medical malpractice causes of action. The first limitation period involved in this case provides that a cause of action is time-barred one year from the date that it "accrues." Ohio Rev. Code § 2305.11(A). This limitation period has been in Ohio law for over a century.

As of July 28, 1975 a second limitation period was added to the Ohio Revised Code by Am. Sub. H.B. 682. The enactment added a statute of repose provision to Ohio Rev. Code § 2305.11. The statute of repose, Ohio Rev. Code § 2305.11(B), provides that a medical malpractice cause of action expires four years after the medical care is rendered.¹

In this petition, Dr. VerMeulen will argue first that insofar as the Ohio Supreme Court's decision had the effect of retroactively reopening the one-year statute of limitations applicable to plaintiff's claims it violated his right to due process of law under the United States Constitution. This aspect of the decision retroactively removed Dr. VerMeulen's vested substantive right created by the operation of the statute of limitations.

In the second part of this petition, Dr. VerMeulen will contend that the failure of the Ohio Supreme Court to apply the four year statute of repose validly enacted by the Ohio

¹ The statute of repose, Ohio Rev. Code § 2305.11(B) was enacted by the Ohio General Assembly as an integral part of a tort reform package designed to alleviate a crisis in availability of medical malpractice insurance in Ohio. See, *Meros v. University Hospitals*, 70 Ohio St.2d 143, 435 N.E.2d 1117 (1982).

General Assembly was fundamentally unfair, arbitrary, and capricious. It is Dr. VerMeulen's position that this failure to apply the four year statute of repose was a distinct and separate violation of his right to due process of law under the Fourteenth Amendment of the United States Constitution.

I. THE DECISION OF THE OHIO SUPREME COURT RETROACTIVELY DEPRIVING PETITIONER OF THE VESTED RIGHT CREATED BY THE EXPIRATION IN 1975 OF THE ONE YEAR STATUTE OF LIMITATIONS IN OHIO REV. CODE § 2305.11(A) DENIED PETITIONER DUE PROCESS OF LAW.

Until July 28, 1975, Ohio Rev. Code § 2305.11 simply provided in pertinent part:

An action for . . . malpractice, including an action for malpractice against a physician, podiatrist, or a hospital, . . . shall be brought within one year after the cause thereof accrued.

For over 80 years, this language was consistently interpreted as meaning that a patient had one year following the termination of the patient-physician relationship within which to file a lawsuit for medical malpractice. *E.g.*, *Wyller v. Tripi*, 25 Ohio St. 2d 164, 267 N.E.2d 419 (1971); *Gillette v. Tucker*, 67 Ohio St. 106, 65 N.E. 865 (1902).

In other words, the Ohio medical malpractice statute of limitations began to run at the termination of the physician-patient relationship, and expired one year from termination of that relationship. This interpretation of the term "accrual," known as the Termination Rule, persisted until well after the medical care and treatment involved in this case. *E.g.*, *Ishler v. Miller*, 56 Ohio St. 2d 447, 384 N.E.2d 296 (1978).

In 1983, the Ohio Supreme Court adopted a new interpretation of the term "accrued" as it is used in R.C. § 2035.11. In *Oliver v. Kaiser Community Health Foundation*, 5 Ohio St. 3d 311, 449 N.E.2d 483 (1983), the Ohio Supreme Court abandoned the well-established Termination Rule, and adopted a definition of "accrued" which refers to the point in time when the plaintiff knew or reasonably should have known he was injured. This interpretation of Ohio Rev. Code § 2305.11 is known as the Discovery Rule.

In this case, the physician-patient relationship between plaintiff and Dr. VerMeulen terminated in 1974. Under the well-settled law in Ohio at that time, Dr. VerMeulen was released from the possibility of a claim arising out of his treatment of plaintiff no later than 1975. Plaintiff did not assert his claims in this case until approximately ten years later in 1985. During the intervening ten years, Dr. VerMeulen believed he was protected from litigation over the medical care and treatment rendered to plaintiff by the expired statute of limitations. The Ohio Supreme Court has now revived plaintiff's claims by retroactively applying the Discovery Rule concept announced in 1983.

A. A STATUTE OF LIMITATIONS IS AN INTEGRAL PART OF ANY SYSTEM FOR THE RESOLUTION OF DISPUTES THAT COMPORTS WITH THE DICTATES OF DUE PROCESS

This Court has defined the concept of due process of law as
a:

constitutional guarantee of respect for those personal immunities which . . . are "so rooted in our tradition and conscience of our people as to be ranked as fundamental," . . . or are "implicit in the concept of ordered liberty" . . .

Rochin v. California, 342 U.S. 165, 169 (1952) (citations omitted). It cannot be disputed that one of the basic rights

protected by the due process clause is the right to rely upon the well-established rules governing the resolution of disputes. As this Court has stated:

Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner.

Boddie v. Connecticut, 401 U.S. 371, 374 (1971).

Without a guarantee of the predictability of the rules governing dispute resolution, the concept of due process would be meaningless. Any system in which tribunals are free to determine the appropriate rules on an *ad hoc* basis would violate our long standing notions of due process. In the words of Mr. Justice Harlan:

Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just.

Boddie at 375.

This Court has repeatedly stated that statutes of limitations are "fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). See also *United States v. Kubrick*, 444 U.S. 111, 117 (1979); *United States v. Marion*, 404 U.S. 307, 322 (1971).

The need for statutes of limitations has been expressed by this Court as follows:

Statutes of limitation, which are found and approved in

all systems of enlightened jurisprudence, represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time, and that "the right to be free from stale claims in time comes to prevail over the right to prosecute them."

United States v. Kubrick, 444 U.S. at 117 (quoting *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944)). See also *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); *Cox v. Ohio Department of Transportation*, 67 Ohio St. 2d 501, 424 N.E. 2d 597 (1981).

From the foregoing discussion it follows that the expiration of a statute of limitations has a two-fold effect: (1) the prospective plaintiff loses a remedy for his alleged injury; and (2) a potential defendant acquires a vested right to be free from further litigation. It is respectfully submitted that when a statute of limitations expires a vested right to be free from further litigation arises and that right is protected by the due process clause of the Fourteenth Amendment of the United States Constitution. See *Goss v. Lopez*, 419 U.S. 565 (1975); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

In this case, Dr. VerMeulen was granted a right to be free from further claims by plaintiff by the Ohio General Assembly. This right vested in 1975 when the prevailing interpretation of the statute of limitations brought an end to plaintiff's right to seek a remedy. Accordingly, Dr. VerMeulen cannot be deprived of this vested right to be free from suit without violating his guarantee to due process of law under the United States Constitution.

B. THE REOPENING OF AN EXPIRED STATUTE OF LIMITATIONS BY DECISIONAL RULE VIOLATES DUE PROCESS OF LAW GUARANTEES

One of the fundamental conclusions reached by the Ohio Supreme Court in this case is that the Discovery Rule interpretation of the statute of limitations first announced in *Oliver v. Kaiser Community Health Foundation*, *supra*, should be applied retroactively to plaintiff's claim. Even if the Ohio Supreme Court is constitutionally permitted to change prospectively its interpretation of Ohio Rev. Code § 2305.11, a retroactive application of the *Oliver* rule to revive plaintiff's otherwise barred cause of action deprives Dr. VerMeulen of the due process of law.

The unfairness of the Ohio Supreme Court's retroactive decision is clearly revealed when tested by the factors this Court has established for non-retroactive application of judicial decisions altering statutes of limitations. In *Chevron Oil v. Huson*, 404 U.S. 97 (1971), this Court set forth three factors to be considered in deciding whether a judicial decision may be applied nonretroactively only.

First the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied, . . . , or by deciding an issue of first impression whose resolution was not clearly fore-shadowed, Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, . . .

Id. at 106-107 (citations omitted). According to *Chevron*, the factors to be considered in determining whether a decision only can be applied nonretroactively are: a) does the decision establish a new principle of law; b) is the purpose of the new

decisional rule helped or hindered by retroactive application; and c) will retroactive application of the new decisional rule result in great inequity?

Clearly, the first factor represents a threshold test and is, therefore, the most important. If the decision is not "a clear break from prior precedent or practice," this Court need not consider the other factors. See *Carter v. City of Chattanooga Tenn.*, 803 F.2d 217 (6th Cir. 1986).

In this case, the Ohio Supreme Court's holding that the discovery rule announced in *Oliver* can be applied retroactively has created a dramatic change in Ohio law applicable to medical claims. The law prior to *Oliver* was consistently interpreted for over eighty years. E.g., *Gillette v. Tucker*, 67 Ohio St. 106, 65 N.E. 865 (1902).

Under the prior interpretation of the statute of limitations a physician could defend against stale claims asserted more than one year after the termination of the professional relationship on the basis of the statute of limitations. After this case, there is essentially no definable point in time when a physician will be free from suit arising out of medical care and treatment, even if it was rendered decades ago.

Therefore, the Ohio Supreme Court's switch from the traditional Termination Rule interpretation of the statute of limitations to the Discovery Rule analysis has had a dramatic impact on the length of time a potential defendant may be sued.

The second factor of the *Chevron* test is whether retroactive application of the new rule of law will further or retard its operation. It is respectfully suggested that retroactive application of the Discovery Rule will not have a significant impact or further the prospective application of the discovery rule interpretation of the statute of limitations.

The third factor of the *Chevron* test is the question as to whether retroactive application would cause great inequity. In this case, as in the case of all similarly situated potential defendants, the answer is categorically "yes."

No physician or hospital could have predicted in 1974 that many years in the future the traditional interpretation of Ohio Rev. Code § 2305.11 would be abandoned, and that suddenly they would be subject to suit for medical care and treatment rendered in 1974. Consequently, there was little or no preparation for the possibility of lawsuits in the remote future.

For example, professional liability insurance coverage was not purchased in order to satisfy potential 1988 or 1989 size judgments. Similarly, it is likely that records retention policies in 1974 were not designed to ensure adequate records would be available fifteen years later to defend against newly filed claims. In other words, physicians and hospitals in 1974 were structuring their professional lives in reliance upon the traditional statute of limitations interpretation, *i.e.*, the Termination Rule.

Accordingly, the retroactive application of the Discovery Rule which is utilized in this case places a tremendous hardship upon potential defendants who cannot turn back the clock and reconstruct the past to meet the wholly unexpected demands of the present.

This situation is strikingly similar to that presented to this Court in *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U.S. 673 (1930). In *Brinkerhoff-Faris* the plaintiff brought suit in a Missouri court to defend against a tax assessment. On appeal, the Supreme Court of Missouri overruled the prior well-established rule that the state tax board had no jurisdiction to hear appeals, and held that plaintiff was not entitled to relief because it had failed to exhaust its newly created administrative remedies. *Id.* at 675.

This Court, in its decision in *Brinkerhoff-Faris*, held that the Missouri court's holding violated due process of law because plaintiff was denied an opportunity to defend against the tax assessment. This Court held that such a denial amounts to a deprivation of property without due process of law. *Id.* at 679.

The well-reasoned analysis in *Brinkerhoff-Faris* is persuasive in the present case. Here, the Ohio Supreme Court's retroactive decision changes well-established law with respect to the statute of limitations. Until this case, there was no reason to preserve records, keep track of witnesses, or otherwise stand ready to defend medical treatment decisions because potential claims were barred under the Termination Rule. In other words, this decision has the effect of reviving claims which may no longer be defensible.

Although this new class of defendants may have the opportunity to appear in court, their ability to defend themselves has been effectively extinguished. The deprivation of any meaningful opportunity to defend oneself constitutes an unwarranted denial of due process of law.

In conclusion, when measured by the factors set forth in *Chevron Oil v. Huson*, *supra*, the retroactive revival of claims which have previously been barred by the Termination Rule, is basically unfair, arbitrary and capricious. Therefore, the retroactive application of the Discovery Rule to reopen claims which had been barred for ten years violates the due process clause of the Fourteenth Amendment.

II. THE DECISION OF THE OHIO SUPREME COURT RETROACTIVELY DEPRIVING PETITIONER OF THE VESTED RIGHT CREATED BY THE EXPIRATION IN 1978 OF THE FOUR YEAR STATUTE OF REPOSE IN OHIO REV. CODE § 2305.11(B) DENIED PETITIONER DUE PROCESS OF LAW.

As of July 28, 1975, the Ohio General Assembly enacted Am. Sub. H.B. 682, a comprehensive, emergency tort reform package.² The enactment was designed to alleviate an availability crises in medical malpractice insurance. See e.g., *Meros v. University Hospitals*, 70 Ohio St. 2d 143, 435 N.E.2d 1117 (1982); *Beatty v. Akron City Hospital*, 67 Ohio St. 2d 483, 424 N.E.2d 586 (1981). Indeed, the Ohio Supreme Court's opinion in this case states: "We accept the proposition that the Legislature enacted R.C. § 2305.11(B) in response to a perceived crisis in the area of malpractice insurance." 32 Ohio St. 3d at 48, 512 N.E.2d at 629.

A. OHIO REV. CODE § 2305.11(B) IS A STATUTE OF REPOSE WHICH IS A SUBSTANTIVE PART OF ANY CAUSE OF ACTION

Ohio Rev. Code § 2305.11(B) provides that:

In no event shall any medical claim . . . be brought more than four years after the act or omission constituting the alleged malpractice occurred. . . .

² The statute of repose set forth in R.C. § 2305.11(B) was simply one of a number of substantive changes in Am. Sub. H.B. 682 that affected the prior common law action for medical malpractice. Those changes included: a new definition of "medical claim"; mandatory arbitration of medical claims; other amendments to the statute of limitations applicable to a "medical claim"; a "cap" on non-economic damages in medical claims; modifications in the collateral source rule in medical claims; limitations on expert witnesses competent to testify in medical claims; and the amendment of the statute of frauds to include "informed consent" medical claims. In short, the Ohio General Assembly essentially converted the prior common law cause of action for medical malpractice into a statutory "medical claim."

Pursuant to this provision, a medical claim ceases to exist if not brought within four years after the medical care and treatment on which the action is based. If a potential plaintiff fails, for whatever reason, to commence the medical claim within the four year period there is no further right to assert a claim. In other words, the statutorily defined "medical claim" exists for only four years.

The four years prescribed by Ohio Rev. Code § 2305.11(B) does not run from the accrual of the cause of action. Its operation is measured from the time the services are rendered. As such, it is a statute of repose rather than a conventional statute of limitations. *Hardy v. VerMeulen*, 32 Ohio St. 3d at 46 n.2, 512 N.E.2d at 627. See also *School Board of the City of Norfolk v. United States Gypsum Company*, No. 870265, Slip op. (Va. Sept. 4, 1987).

The significance of this distinction was stated by the Supreme Court of New Jersey in *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 199, 293 A.2d 662 (1972). That case involved a ten-year statute of repose which pertained to causes of action arising from deficiency in design, planning, supervision or construction of improvements to real property. Plaintiff had argued in *Rosenberg*, as is argued by plaintiff in this case, that the statute of repose deprived her of her constitutional rights in that it barred her cause of action before it accrued. The New Jersey Supreme Court rejected her argument, and stated:

This formulation suggests a misconception of the effect of the statute. It does not bar a cause of action; its effect rather is to prevent what otherwise might be a cause of action, from ever arising. Thus injury occurring more than ten years after the negligent act allegedly responsible for the harm forms no basis for recovery. The injured party literally has no cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress. The function of the statute is thus rather to define substantive rights than to alter or modify a remedy. The Legislature is entirely at

liberty to create new rights or abolish old ones as long as no vested right is disturbed. 61 N.J. 190 at 199.

Accord, Cheswold Fire Co. v. Lambertson Construction Co., 489 A.2d 413 (Del. 1984). *See also Bolick v. American Bargmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982); *Kahn v. Transworld Airlines, Inc.*, 82 App. Div. 2d 696, 443 NYS 2d 79 (N.Y. App. Div. 1981).

The concept of a statute of repose has been developed by state legislatures as they have struggled with an ever-expanding volume of tort litigation. This concept has been used most frequently in specific categories of tort litigation, *i.e.*, medical malpractice, products liability, and construction litigation. *See Comment, Due Process Challenges to Statutes of Repose*, 40 S.W.L.J. (1986); *Note, The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 Vand. L. Rev. 627 (1985).

Although statutes of repose have been struck down by some courts on constitutional grounds, *e.g.*, *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980), the vast majority of courts have held that statutes of repose are constitutional.³

For example, in *Hartford Fire Insurance Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy*, 740 F.2d 1362 (6th Cir. 1984), the Sixth Circuit affirmed a grant of summary judgment on the basis that Ohio Rev. Code § 2305.131, which applies to construction cases, is a constitutional statute of repose whose enactment was within the prerogative of legislature. In reaching this conclusion, the Sixth Circuit rejected plaintiff's claims that a statute of repose violated plaintiff's constitutional rights. *Accord Adair v. Koppers Co., Inc.*,

³ *E.g.*, *Hartford Fire Insurance Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy*, 740 F.2d 1362 (6th Cir. 1984); *Mathis v. Eli Lilly & Co.*, 719 F.2d 134 (6th Cir. 1983); *Hill v. Fitzgerald*, 304 Md. 689, 501 A.2d 27 (1985); *Twin Falls Clinic & Hospital Building Corp. v. Hamill*, 103 Idaho 19, 644 P.2d 341 (1982); *Dunn v. St. Francis Hosp., Inc.*, 401 A.2d 77 (Del. 1979); *Harrison v. Schrader*, 569 S.W.2d 822 (Tenn. 1978).

541 F.Supp. 1120 (N.D. Ohio 1982); *Deaconess Home Ass'n v. Turner*, 14 Ohio App.3d 281, 470 N.E.2d 950 (1984).

In light of the foregoing discussion, it is clear that the Ohio Supreme Court had an inadequate basis for its conclusion that Ohio Rev. Code § 2305.11(B) is unconstitutional because it denies plaintiff a remedy for his cause of action. It is plain that Ohio Rev. Code § 2305.11(B) is actually a part of the cause of action, and not merely a limitation period. Because the Ohio Supreme Court failed to present an appropriate basis of justification of its holding in light of the general law in the area, its decision was arbitrary and capricious, and therefore, violates the due process guarantee. See *American Railway Express Co. v. Kentucky*, 273 U.S. 269, 273 (1927).

B. THE DECISION OF THE OHIO SUPREME COURT IN THIS CASE, WHICH RETROACTIVELY INVALIDATED OHIO REV. CODE § 2305.11 (B) DENIED PETITIONER DUE PROCESS OF LAW.

In this case, the Ohio Supreme Court refused to apply the four year statute of repose in Ohio Rev. Code § 2305.11(B) on the basis that the time bar "closed" Ohio Courts to plaintiff. The Court reasoned that Section 16, Article I of the Ohio Constitution requires that courts be "open" to claims filed by plaintiffs irrespective of legislative decisions regarding statutes of limitation or repose.

However, in reaching this conclusion, the Court utterly failed to consider that Dr. VerMeulen also had a right to due process of law protected by the Ohio Constitution and United States Constitution. In fact, the decision never addresses the issue as to whether Dr. VerMeulen has any right to due process of law.

It is respectfully submitted that Dr. VerMeulen did acquire a vested right in the expiration of the four year statute of repose in 1978. From that time forward he would have been free to order his professional life without considering the need

to defend against a stale claim such as plaintiff's claim in this case. *United States v. Kubrick*, 444 U.S. 111 (1979); *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944).

Moreover, even if the Ohio Supreme Court is constitutionally permitted to non-retroactively destroy Dr. VerMeulen's vested interest in an expired statute of repose, the Court should not be permitted to render a decision retroactively as in this case.

The application of the *Chevron Oil v. Huson*, 404 U.S. 97 (1971) analysis to the provisions of Ohio Rev. Code § 2305.11 (B) statute of repose results in the same conclusion as when the analysis is applied to the one year statute of limitations in Ohio Rev. Code § 2305.11(A). Accordingly, the refusal of the Ohio Supreme Court to enforce the statute of repose should be limited to non-retroactive situations.

In sharp contrast to the decisions in this case, the Virginia Supreme Court has held recently that an action which has been completely extinguished by the operation of a statute of repose cannot be revived without violating the constitutional rights of the prospective defendant. *School Board of the City of Norfolk v. United States Gypsum*, Case No. 870265 (Va. Sept. 4, 1987). In *Norfolk* the Virginia statute of repose applicable to construction actions had extinguished plaintiff's claims in 1976. The action was based upon the presence of asbestos-containing products which were placed in school buildings between 1939 and 1971.

In 1986, the Virginia legislature enacted a statute which purported to "revive" the cause of action until 1990. In addressing the constitutionality of the legislation the Virginia Supreme Court held:

As a statute of repose, Code § 8.08-250 is a redefinition of the substantive rights and obligations of the parties to any litigation [to which it applies] . . . Specifically, we think the lapse of the statutory period was meant to extinguish all the rights of a plaintiff, including those which might arise from an injury sustained later . . .

and to grant a defendant immunity for all the torts specified in the statute.

The Court concluded that reopening of the claim after defendant had a vested substantive right to be immune from suit violated the due process guarantee. *Id.* Plainly, the decision of the Ohio Supreme Court is in direct conflict with the well-reasoned opinion of the Virginia Supreme Court.

Here, Dr. VerMeulen had a vested right to conduct his affairs with some assurance that plaintiff's extinguished claim would remain barred by Ohio Rev. Code § 2305.11(B). The Ohio Supreme Court's utter failure to consider Dr. VerMeulen's rights is contrary to fundamental principles of our judicial system, arbitrary and capricious. It therefore, deprives him of property without due process of law in contravention of the United States Constitution.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment of the Ohio Supreme Court.

Respectfully submitted,

Earl F. Morris
James E. Pohlman
William M. Todd
Terri-Lynne B. Smiles

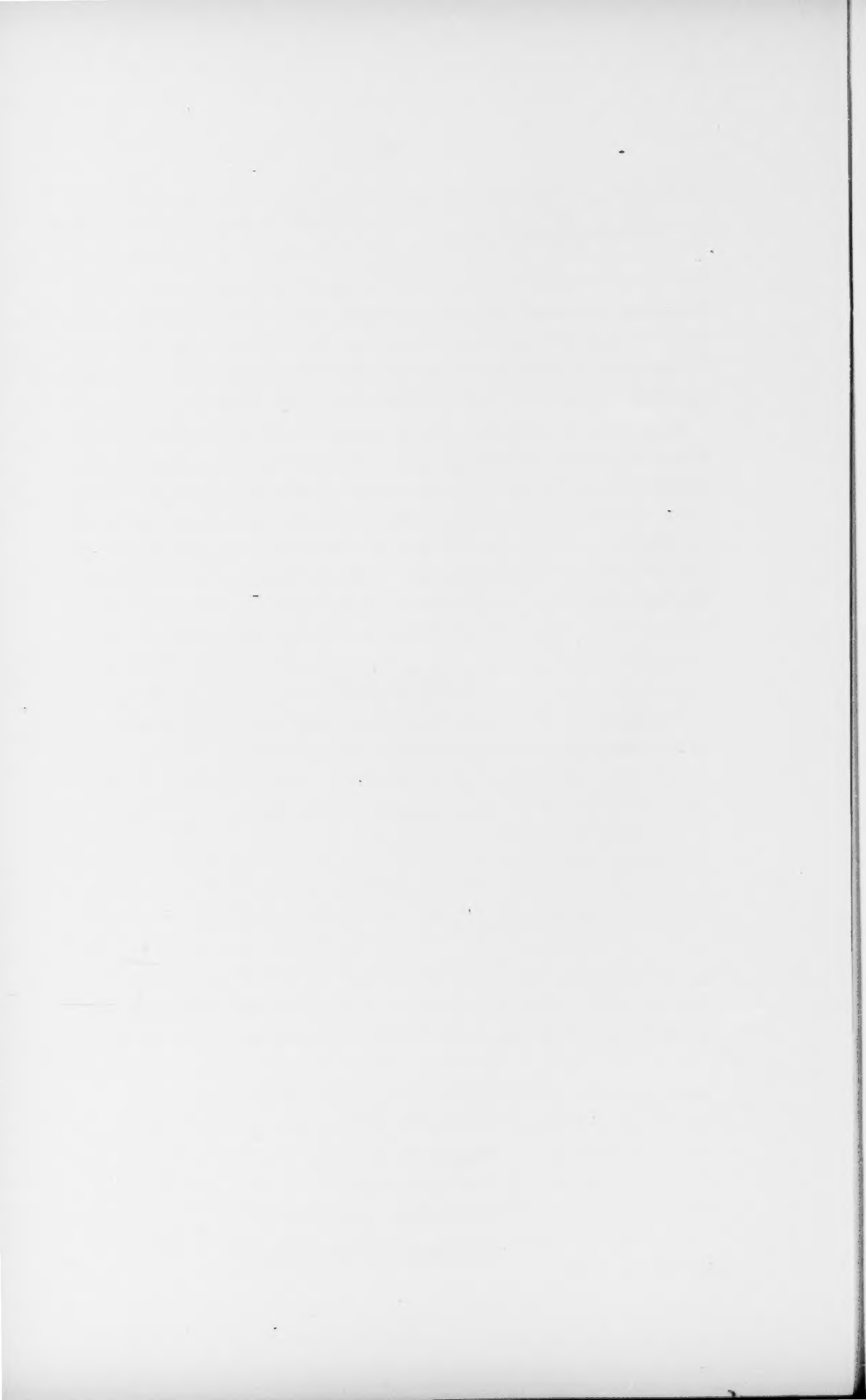
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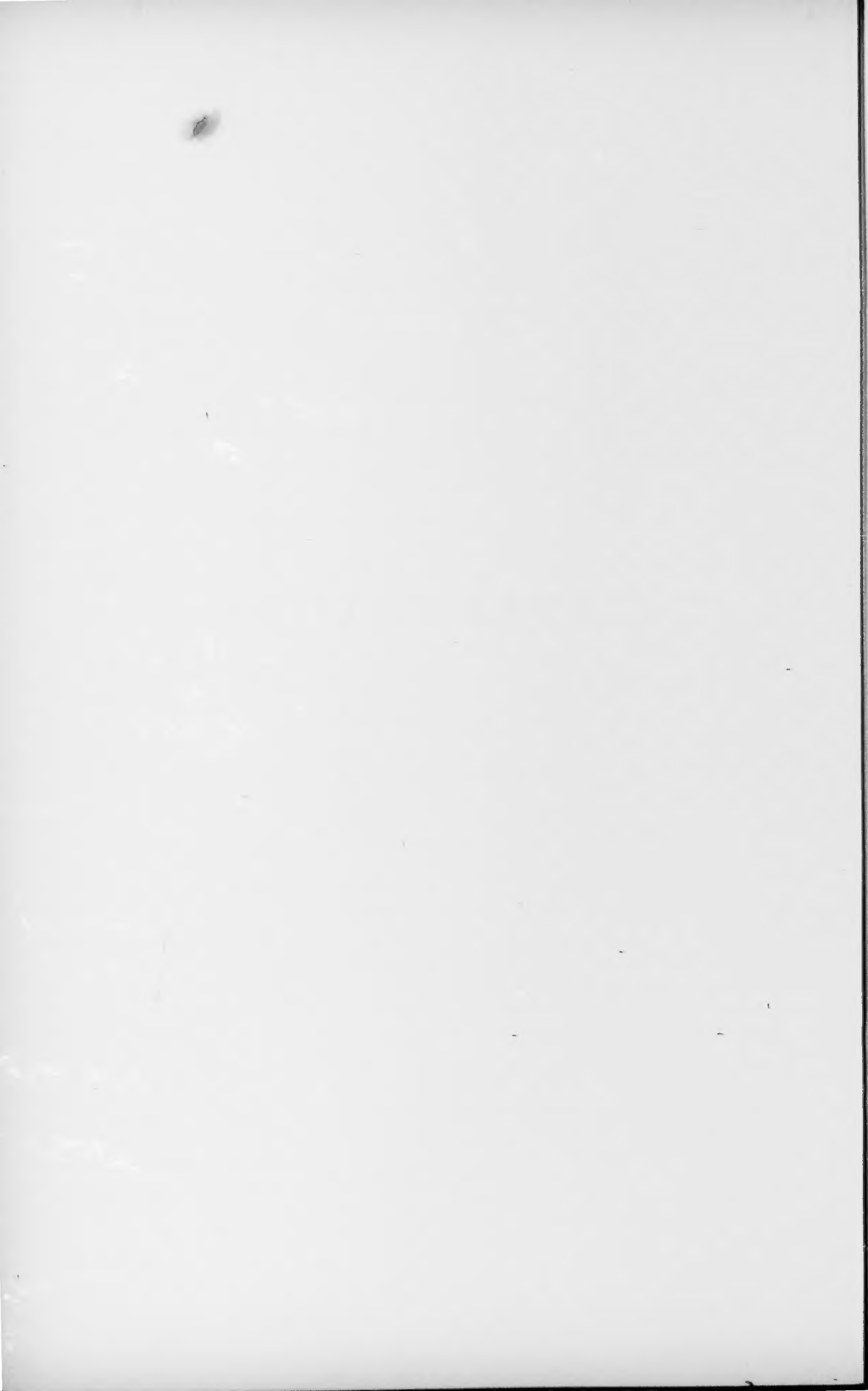
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January 4, 1988



APPENDICES



APPENDIX A

**IN THE
SUPREME COURT OF THE STATE OF OHIO**

Case No. 86-1448

CARL E. HARDY, M.D.,
Plaintiff-Appellant,

v.

VICTOR R. VERMEULEN, M.D., et al.,
Defendants-Appellees.

**Appeal from The Tenth Appellate District
Franklin County, Ohio**

Opinion, per H. Brown, J.
Decided August 12, 1987

The appellant, Carl E. Hardy, M.D., filed a malpractice action against his physicians, the appellees, Victor R. VerMeulen, M.D., and Victor R. VerMeulen, Inc.

Surgical procedures, giving rise to the claim of malpractice, were performed by Dr. VerMeulen on appellant's right ear in 1973 and 1974. The physician-patient relationship ended in 1974.

Appellant asserts that " * * * [t]he malpractice injury which is the subject matter of this action was discovered April 15, 1984." In April, 1985, notice was sent by appellant in order to extend the statute of limitations by one hundred eighty days. Appellant subsequently filed his complaint on October 1, 1985, within the one-hundred-eighty-day period.

Pursuant to Civ. R. 12(C), appellees moved to dismiss on the basis that appellant's claim was barred by R.C. 2305.11(B), since appellant failed to bring his action within four years following the act or omission constituting the alleged malpractice.

The trial court sustained appellees' motion and the court of appeals affirmed.

The cause is now before this court pursuant to the allowance of a motion to certify the record. Jerry L. Maloon Co., L.P.A., and Jeffrey L. Maloon, for appellant.

Robert L. Herron, for appellees.

HERBERT R. BROWN, J. In this case, the four-year period specified by R.C. 2305.11(B) would, if applied, bar the appellant's claim before he knew of the injury he suffered.¹ In order to affirm we are required: (1) to find that R.C. 2305.11(B) may constitutionally achieve that result and (2) to apply R.C. 2305.11(B) retroactively to bar a cause of action where the act of malpractice occurred prior to the effective date of the statute.

I

Our analysis begins with an examination of what R.C. 2305.11(B) is and what it is not. It is not a traditional statute of limitations, since the appellant was not aware of his injury and thus his cause of action was extinguished before he could act upon it.² R.C. 2305.11(B) does not alter the standard of proof in malpractice cases and it does not change the evidentiary requirements of such cases. It does not alter the elements in the tort or change the rule of damages. In short, R.C. 2305.11(B) does not change the substantive character of a malpractice action.

¹ For our determination herein, we take the allegations in appellant's complaint as true since judgment was entered by the trial court, against appellant, on the pleadings.

² Statutes which have the effect of denying a remedy to one before it accrues have sometimes been described as statutes of repose and they differ from traditional statutes of limitations which impose a period of time for bringing suit after one's cause of action accrues.

R.C. 2305.11, if applied to those who suffer bodily injury from medical malpractice but do not discover that injury until four years after the act of malpractice, accomplishes one purpose—to deny a remedy for the wrong. In other words, the courts of Ohio are closed to those who are not reasonably able, within four years, to know of the bodily injury they have suffered.

Section 16, Article I of the Ohio Constitution provides:

All courts shall be open, and *every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law*, and shall have justice administered without denial or delay. (Emphasis added.)

The appellant has no remedy for an injury to his body when his claim is extinguished before he knew of the injury or could have reasonably discovered it.³

Thus, as applied to the facts in the case *sub judice*, R.C. 2305.11 is in violation of Section 16, Article I of the Ohio Constitution. The language in the Constitution is clear and leaves little room for maneuvering. Our courts are to be open to those seeking remedy for injury to person, property, or reputation.

As this court said in *Kintz v. Harriger* (1919), 99 Ohio St. 240, 247, 124 N.E. 168, 170:

Manifestly, when the constitution of the state declares and defines certain public policies, such public policies must be paramount, though a score of statutes conflict and a multitude of judicial decisions be to the contrary.

³ A cause of action for medical malpractice does not accrue until the patient discovers or in the exercise of reasonable care and diligence should have discovered the resulting injury. *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St. 3d 111, 5 OBR 247, 449 N.E. 2d 438. The same rule was applied to a cause of action for legal malpractice in *Skidmore & Hall v. Rottman* (1983), 5 Ohio St. 3d 210, 5 OBR 453, 450 N.E. 2d 684.

No general assembly is above the plain, potential provisions of the constitution, and no court, however sacred or powerful, has the right to declare any public policy that clearly contravenes or nullifies the rights declared in the constitution. (Emphasis added.)

The holding in *Kintz* reads as follows:

1. The Constitution of Ohio, Bill of Rights, Section 16, provides, among other things, 'Every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law.'
2. It is the primary duty of courts to sustain this declaration of right and remedy, wherever the same has been wrongfully invaded. *Id.* at paragraphs one and two of the syllabus.

See, also *Byers v. Meridian Printing Co.* (1911), 84 Ohio St. 408, 95 N.E. 917, paragraph two of the syllabus (a legislative enactment changing the presumption and burden of proof as to malice in defamation cases was found unconstitutional and void under Section 16, Article I); *Williams v. Marion Rapid Transit, Inc.* (1949), 152 Ohio St. 114, 39 O.O. 433, 87 N.E. 2d 334 (denial of remedy to an unborn viable child violated Section 16, Article I); *Primes v. Tyler* (1975), 43 Ohio St. 2d 195, 205, 72 O.O. 2d 112, 117, 331 N.E. 2d 723, 729 (the Ohio Guest Statute was found in violation of Section 16, Article I, " * * * in that it closes the courts and denies a remedy by due course of law to some but not all the people of this state * * *").⁴

⁴ Our attention has been drawn to R.C. 2305.29, in which the legislature abolished the common-law actions of criminal conversation and alienation of affections. That statutory abolition did not violate Section 16, Article I because the denial of remedy did not reach injury to *person, property, or reputation*. See *Haskins v. Bias* (1981), 2 Ohio App. 3d 297, 2 OBR 329, 441 N.E. 2d 842; *Vrabel v. Vrabel* (1983), 9 Ohio App. 3d 263, 9 OBR 477, 459 N.E. 2d 1298; and *Slusher v. Oeder* (1984), 16 Ohio App. 3d 432, 16 OBR 503, 476 N.E. 2d 714.

In *Lafferty v. Shinn* (1882), 38 Ohio St. 46, 48, this court recited Section 16, Article I and said that:

* * * it is not within the power of the legislature to abridge the period within which an existing right may be so asserted as that there shall not remain a reasonable time within which an action may be commenced.

If the legislature may not constitutionally enact an unreasonable statute of limitations, it follows that the legislature cannot deprive one of a right before it accrues.

We agree with the reasoning of the Supreme Court of South Dakota in *Daugaard v. Baltic Co-op. Bldg. Supply Assn.* (S.D. 1984), 349 N.W. 2d 419, 424-425, that a statute such as R.C. 2305.11(B) unconstitutionally locks the courtroom door before the injured party has had an opportunity to open it. When the Constitution speaks of remedy and injury to person, property, or reputation, it requires an opportunity granted at a meaningful time and in a meaningful manner. See, also, *Kennedy v. Cumberland Engineering Co.* (R.I. 1984), 471 A. 2d 195; *Boddie v. Connecticut* (1970), 401 U.S. 371, 377-378; *Neagle v. Nelson* (Tex. 1985), 685 S.W. 2d 11, 12; *Berry v. Beach Aircraft Corp.* (Utah 1985), 717 P. 2d 670; *Jackson v. Mannesmann Demag Corp.* (Ala. 1983), 435 So. 2d 725; *Overland Constr. Co. v. Sirmons* (Fla. 1979), 369 So. 2d 572; *Kenyon v. Hammer* (1984), 142 Ariz. 69, 75-76, 688 P. 2d 961, 967-968.

Accordingly, we hold that R.C. 2305.11(B), as applied to bar the claims of medical malpractice plaintiffs who did not know or could not reasonably have known of their injuries, violates the right-to-a-remedy provision of Section 16, Article I of the Ohio Constitution.

II

The result we reach follows logically from our decision of December 22, 1986 in *Mominee v. Scherbarth* (1986), 28 Ohio St. 3d 270, 28 OBR 346, 503 N.E. 2d 717, syllabus, in

which we held R.C. 2305.11(B) unconstitutional as applied to minors.⁵ At that time, five of the seven court members suggested a violation of Section 16, Article I.

In *Mominee*, we expressed no opinion as to the constitutionality of R.C. 2305.11(B) as applied to adults (*id.* at fn. 6), although Justices Douglas and C. Brown stated the opinion that the statute, when so applied, would be unconstitutional.

Little distinction can be made between an adult plaintiff who did not know of his or her injury and a minor. It may be argued that the adult who was unaware of the injury is under a *greater* disability than the minor who knew of the injury but did not assert a claim within the four-year period.

III

We are mindful that acts of the General Assembly are presumed valid. See *State v. Dorso* (1983), 4 Ohio St. 3d 60, 61, 4 OBR 150, 151, 446 N.E. 2d 449, 450; *Peebles v. Clement* (1980), 63 Ohio St. 2d 314, 321, 17 O.O. 3d 203, 207, 408 N.E. 2d 689, 693; *State, ex rel. Taft, v. Campanella* (1977), 50 Ohio St. 2d 242, 246, 4 O.O. 3d 423, 425, 364 N.E. 2d 21, 24. We accept the proposition that the legislature enacted R.C. 2305.11(B) in response to a perceived crisis in the area of malpractice insurance.

The right-to-a-remedy provision of Section 16, Article I does not require the analysis of a rational-basis that is used to decide due process or equal protection arguments against the

⁵ See, also, *Schwan v. Riverside Methodist Hospital* (1983), 6 Ohio St. 3d 300, 6 OBR 361, 452 N.E. 2d 1337, syllabus, wherein we first held that "R.C. 2305.11(B) is unconstitutional with respect to malpractice litigants who are minors."

⁶ In *Schwan, supra*, we overruled *Vance v. St. Vincent Hospital* (1980), 64 Ohio St. 2d 36, 18 O.O. 3d 216, 414 N.E. 2d 406. In *Vance*, this court upheld R.C. 2305.11(B) as applied to a minor who had discovered her injury. It is noteworthy that the court in *Vance* recognized that denial of a remedy to one who was unaware of her injury might invoke constitutional infirmities even though none arose from the fact that the plaintiff was a minor. The court expressed no opinion as to the constitutionality of R.C. 2305.11 when applied to those without knowledge of their injury.

constitutionality of legislation. The fault in R.C. 2305.11(B) is that it denies legal remedy to one who has suffered bodily injury. This the legislature may not do even if it acted with a rational basis.⁷

Further, the legislature when it adopted R.C. 2305.11(B) did not specifically address the situation of one who did not know of his or her injury. The statute was adopted prior to our decision in *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St. 3d 111, 5 OBR 247, 449 N.E. 2d 438; thus, presumably the intent of the legislature was to put a limit on the rule that a malpractice action could be filed any time up to one year after the termination of the physician-patient relationship. The physician-patient relationship could continue for many years after the act of malpractice. Where a plaintiff has allowed more than one year to run following discovery of injury, R.C. 2305.11(B) might pass constitutional muster as a limitation on the further time extension accorded by a continuing physician-patient relationship. However, that issue is not before us and we reserve our opinion thereon.

IV

Our determination rests upon denial of remedy. We do not suggest that causes of action as they existed at common law or the rules that govern such causes are immune from legislative attention. As this court said in *Fassig v. State, ex rel. Turner* (1917), 95 Ohio St. 232, 248, 116 N.E. 104, 108:

⁷ Whether R.C. 2305.11(B) violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment involves a determination of whether the legislature acted with a rational basis. In other jurisdictions, statutes of repose, having features similar to ours, have been analyzed on due process and equal protection grounds. The courts are divided on the question of whether due process and equal protection arguments render a statute of repose unconstitutional. See Comment, *Due Process Challenges to Statutes of Repose* (1986), 40 Sw. L. J. 997; Note, *The Constitutionality of Statutes of Repose: Federalism Reigns* (1985), 38 Vand. L. Rev. 627. An extended analysis of the fair-and-substantial-relation test as applied to a malpractice statute of repose is contained in *Carson v. Mauer* (N.H. 1980), 424 A. 2d 825, and in *Kenyon v. Hammer* (1984), 142 Ariz. 69, 688 P. 2d 961.

No one has a vested right in rules of the common law. Rights of property vested under the common law cannot be taken away without due process, but the law itself as a rule of conduct may be changed at the will of the legislature *unless prevented by constitutional limitations*. The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to new circumstances. *Mondou v. N.Y., N.H. & H. Rd. Co.*, 223 U.S. 1; *Munn v. Illinois*, 94 U.S. 113; *Martin v. P. & L. E. Rd. Co.*, 203 U.S. 284; and *Western Union Tel. Co. v. Commercial Milling Co.*, 218 U.S. 406.

Our constitutions were made in the contemplation that new necessities would arise with changing conditions of society. (Emphasis added.) See, also, *Schenkolewski v. Metroparks System* (1981), 67 Ohio St. 2d 31, 21 O.O. 3d 19, 426 N.E. 2d 784.⁸

As noted, the legislature, in enacting R.C. 2305.11(B), has made no effort to alter the substantive law of malpractice. Rather, the legislature has sought to limit the time in which malpractice actions may be brought and it has done so in a manner which denies to some people (including the appellant herein) a remedy for injury to their person.

⁸ Common-law remedies were extinguished by the adoption of state workers' compensation statutes. In Ohio the first of such statutes was upheld against attack under Section 16, Article I on the ground that the worker consented to operate under this law and received substantial protections and privileges from the State Insurance Fund in return for relinquishment of his right of action for negligence. *State, ex rel. Yaple, v. Creamer* (1912), 85 Ohio St. 349, 339-400, 97 N.E. 602, 607. The issue with regard to workers' compensation was subsequently resolved by the adoption of Section 35, Article II.

The Ohio Marketable Title Act, R.C. 5301.47 through 5301.56, destroys certain ancient property interests and removes remedies used to enforce those ancient interests. It has been noted that such would not have been tolerated if no method of preserving a remedy had been provided. Smith, *The New Marketable Title Act* (1961), 22 Ohio St. L. J. 712, 717. As to the constitutionality of marketable title Acts generally, see Simes & Taylor, *Improvement of Conveyancing by Legislation* (1960) 253-273.

Accordingly, we reverse the judgment of the court of appeals and remand the cause of the trial court for further proceedings in accordance with our opinion herein.

Judgment reversed and
cause remanded.

SWEENEY, Acting C.J., LOCHER and DOUGLAS, JJ.,
concur.

MARKUS and WRIGHT, JJ., concur in judgment only and
dissent in part.

HOLMES, J., concurs in judgment, but dissents to the
syllabus law and the opinion.

SWEENEY, J., sitting for MOYER, C.J.

MARKUS, J., of the Eighth Appellate District, sitting for
SWEENEY, J.

DOUGLAS, J., concurring. I concur in Justice Herbert
Brown's well-reasoned majority opinion. I heartily agree with
today's holding the R.C. 2305.11(B) violates the Ohio Con-
stitution.

I have previously expressed my firm belief that R.C.
2305.11(B) is unconstitutional as applied to both minors and
adults, on the basis that it offends the access-to-the-courts
provision of Section 16, Article I of the Ohio Constitution. See
Mominee v. Scherbarth (1986), 28 Ohio St. 3d 270, 290-293,
28 OBR 346, 363-365, 503 N.E. 2d 717, 732-734 (Douglas, J.,
concurring). There, I stated that:

[s]ince the bottom-line effect of this statute of repose,
R.C. 2305.11(B), is to abolish a common-law right or ac-
tion which existed at the time the Constitution was
adopted, and since the legislature provided no reason-
able alternative remedy or substitute for the one which it
has abrogated, this court must hold that R.C.
2305.11(B) is violative of Section 16, Article I of the
Ohio Constitution and is, therefore, unconstitutional.

* * *

Id. at 293, 28 OBR at 365, 503 N.E. 2d at 734.

In addition, I write separately to reiterate a concern I recently expressed in my dissent to *Hoffman v. Davidson* (1987), 31 Ohio St. 3d 60, 63-64, 31 OBR 165, 168-169, 508 N.E. 2d 958, 961-962. Several statements in today's majority decision imply that it is the date of the discovery of the *injury* which marks the accrual of a cause of action in medical malpractice. This implication is inaccurate. It is the discovery of the *malpractice which caused the injury*, not just of the injury itself, which tolls the statute. As stated in my dissent to Hoffman, *supra*,

* * * in many cases the injury will be immediately obvious, but the patient will have no reason to suspect that the injury was actually caused by malpractice until after the limitations period has passed. * * *

Id. at 63, 31 OBR at 168, 508 N.E. 2d at 961. See, also *Fry-singer v. Leech* (1987), 32 Ohio St. 3d 38, 44 N.E. 2d ____, ____, (Douglas, J., concurring in judgment).

A cause of action in medical malpractice does not arise from mere injury alone. The injury must be the result of malpractice. Thus, the cause of action cannot accrue until the patient discovers that malpractice has occurred, and the statute of limitations does not commence to run until such a discovery transpires, or reasonably should have transpired.

SWEENEY, J., concurs in the foregoing concurring opinion.

WRIGHT, J., concurring in judgment only and dissenting in part. Today, a majority of this court attributes a meaning to Section 16, Article I of the Ohio Constitution not heretofore recognized in the one hundred thirty-six year history of the provision.⁹ This result is most certainly not supported by the language of the provision itself. Since today's holding effectively rewrites a provision of the Ohio Constitution, I am compelled to dissent.

⁹ Section 16, Article I was made a part of the Ohio Constitution as adopted in March 1851. However, the identical guarantee existed in the version of the state Constitution adopted in 1802, under Section 7, Article VIII.

R.C. 2305.11 provides, in pertinent part:

- (A) An action for * * * malpractice, including an action for malpractice against a physician, podiatrist, [or a] hospital * * *, shall be brought within one year after the cause thereof accrued * * *.

* * *

- (B) In no event shall any medical claim against a physician, podiatrist, or a hospital * * * be brought more than four years after the act or omission constituting the alleged malpractice occurred.
* * *

This clearcut statement was and is supported by sound public policy considerations developed by the Ohio General Assembly.¹⁰

Appellant's constitutional attack on R.C. 2305.11(B) is predicated upon due process considerations under Section 16, Article I. Nowhere does appellant mention in his brief that R.C. 2305.11(B) somehow violates the "open court" provision. It will indeed come as a surprise to the litigants in the case at bar that this court, without prompting from either party, has gratuitously and *sua sponte* raised and decided this case on the "open court" theory.

We must remain cognizant that "[a] regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality. * * * [We have consistently] held enactments of the General Assembly to be constitutional unless such enactments are clearly unconstitutional beyond a reasonable doubt." *State, ex rel. Dickman, v. Defenbacher* (1955), 164 Ohio St. 142, 147, 57 O.O. 134, 137, 128 N.E. 2d 59, 63. See, also *Benevolent Assn. v. Parma* (1980), 61 Ohio St. 2d 375, 15 O.O. 3d 450, 402 N.E. 2d 519; *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St. 3d 7, 12 OBR 6, 465 N.E. 2d 421. In addition, it is axiomatic that this court will

¹⁰ See *Mominee v. Scherbarth* (1986), 28 Ohio St. 3d 270, 295-299, 28 OBR 346, 368-371, 503 N.E. 2d 717, 736-740 (Wright, J., dissenting).

not pass upon the constitutionality of a statute unless it is "absolutely necessary" to the resolution of the case or controversy. *State, ex rel. Hofstetter, v. Kronk* (1969), 20 Ohio St. 2d 117, 119, 49 O.O. 2d 440, 441, 254 N.E. 2d 15, 17.¹¹

Despite this wealth of authority, the majority refuses to acknowledge that *Deskins v. Young* (1986), 26 Ohio St. 3d 8, 26 OBR 7, 496 N.E. 2d 897, is on all fours with the subject cause, thus making it unnecessary to decide this case under new constitutional principles.¹² Moreover, even if the con-

¹¹ See, also, *Anderson v. Jacobs* (1981), 68 Ohio St. 2d 67, 22 O.O. 3d 268, 428 N.E. 2d 419; *Euclid v. Heaton* (1968), 15 Ohio St. 2d 65, 44 O.O. 2d 50, 238 N.E. 2d 790; *Greenhills Home Owners Corp. v. Greenhills* (1966), 5 Ohio St. 2d 207, 34 O.O. 2d 420, 215 N.E. 2d 403, paragraph one of the syllabus; *Cuyahoga Falls v. Bowers* (1984), 9 Ohio St. 3d 148, 151, 9 OBR 438, 441, 459 N.E. 2d 532, 535; *State v. Weissman* (1982), 69 Ohio St. 2d 564, 566, 23 O.O. 3d 477, 479, 433 N.E. 2d 216, 217; *Strongsville v. McPhee* (1944), 142 Ohio St. 534, 27 O.O. 466, 53 N.E. 2d 522, paragraph three of the syllabus; *Rucker v. State* (1928), 119 Ohio St. 189, 162 N.E. 802, paragraph one of the syllabus.

¹² In *Deskins, supra*, the plaintiff underwent surgery on or about June 22, 1971. According to this court's statement of the case, approximately twelve years later, in June 1983, the plaintiff underwent a second surgery, at which time it was discovered that the initial surgery had not been fully completed. Until this time the plaintiff could not have been aware that the surgery may have been negligently performed. When the plaintiff filed his complaint in November 1984 against the defendant-surgeon who performed the surgery in 1971, the defendant sought summary judgment arguing, *inter alia*, that the claim was time-barred pursuant to R.C. 2305.11(B), which became effective July 28, 1975. Although the lower courts agreed that the complaint was time-barred, this court reversed, stating: "* * * [T]he retroactive application of R.C. 2305.11(B) to a cause of action arising from an act of malpractice occurring prior to its effective date, where the malpractice could not reasonably have been discovered within four years, would totally eliminate appellant's substantive right in her cause of action without affording her a reasonable time within which to enforce that right. Such an application contravenes the proscription against retroactive laws contained in Section 28, Article II of the Ohio Constitution. Therefore, R.C. 2305.11(B) will not operate to bar appellant's claim." *Id.* at 10, 26 OBR at 8, 496 N.E. 2d at 898. Similarly, in the case at bar, the plaintiff underwent a series of stapedectomies and revised stapedectomies between March 1973 and March 1974, which, according to the plaintiff, were negligently performed but not discoverable until April 1984.

stitutionality of R.C. 2305.11(B) was ripe for our determination, I am unable to accept the contention that this statute somehow violates the "open court" provision of Section 16, Article I of the Ohio Constitution. That section provides:

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Today, the majority *ex cathedra* revises this provision to read that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy." The obvious flaw contained within the majority's reasoning is that this section of our Constitution only affords access to the courts to seek remedies *by due course of law*, not access to seek any and all remedies for perceived injuries. Stated otherwise, even appellant concedes that the "due course of law" provision of Section 16, Article I, is functionally equivalent with "due process of law" under the federal Constitution, and *nothing more*. In view of the fact that at least three members of today's majority have previously agreed that the four-year statute of repose within R.C. 2305.11(B) affords plaintiffs a reasonable time in which to seek redress for alleged malpractice, and hence the statute does not violate due process of law (see, *e.g.*, *Opalko v. Marymount Hospital, Inc.* [1984], 9 Ohio St. 3d 63, 9 OBR 267, 458 N.E. 2d 847, Sweeney and Locher, JJ., and *Mominee v. Scherbarth* [1986], 28 Ohio St. 3d 270, 290-291, 28 OBR 346, 363-364, 503 N.E. 2d 717, 732-733, Douglas, J. concurring), it is not surprising that the majority seeks new avenues with which to declare this enactment constitutionally infirm.

In my view, the majority's initial error lies in its misreading of *Lafferty v. Shinn* (1882), 38 Ohio St. 46. The majority states that in *Lafferty* the court:

recited Section 16, Article I and said that " * * it is not within the power of the legislature to abridge the period

within which an *existing right* may be so asserted as that there shall not remain a reasonable time within which an action may be commenced.'

(Emphasis added.)

However, even a cursory examination of *Lafferty* demonstrates that when the court referred to the abridgment of existing or vested rights, it did so with a reliance upon section 28, Article II (prohibiting the passage of retroactive laws), and *not* Section 16, Article I. Thus, the passage in *Lafferty* relied upon by the majority stands for the well-established principle that the General Assembly may not retroactively destroy a vested right (Section 28, Article II), *not* that the legislature is precluded from modifying a former common-law right.¹³

¹³ As was stated by the court in *Gallegher v. Davis* (1936), 37 Del. [Super.] 380, 391, 183 A. 620, 624:

"* * * [N]o one has a vested interest in any rule of the common law. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, within constitutional limits, may be changed at the will of the legislature. The great office of statutes is to remedy defects in the common law as they develop, and to adapt it to the change of time and circumstance. * * * Negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation, with a corresponding change in the test of negligence, * * * and, as said by the * * * [United States Supreme Court] with respect to the *Fourteenth Amendment*, in *Silver v. Silver*, *supra*, when that case was before it (280 U.S. 117, [122] * * *).

" 'We need not * * * elaborate the rule that the *Constitution* does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object.' " See, also, *Fassig v. State, ex rel. Turner* (1917), 95 Ohio St. 232, 248, 116 N.E. 104, 108; *Sidle v. Majors* (1976), 264 Ind. 206, 209, 341 N.E. 2d 763, 766; *Anderson v. Wagner* (Miss. 1981), 402 So. 2d 320, 322. To hold otherwise would * * * encroach upon the Legislature's ability to guide the development of the law * * * simply because the rule enacted by the Legislature rejects some cause of action currently preferred by the courts * * * [and] would * * * place * * * certain non-constitutional decisions of courts above all change except by constitutional amendment." *Freezer Storage, Inc. v. Armstrong Cork Co.* (1978), 476 Pa. 270, 281, 382 A. 2d 715, 721.

The majority then compounds the error from its misreading of *Lafferty* when it fails to recognize the distinction between vested and nonvested property rights. Where an injury occurs giving rise to a *recognized cause of action*, that cause of action becomes a *vested property right* entitled to due process protections. Accord *Gibbes v. Zimmerman* (1933), 291 U.S. 326. Conversely, if the injury has yet to occur, the cause of action cannot be said to have vested and due process will not prevent the abolition of same in the interest of appropriate legislative objectives. *Silver v. Silver* (1929), 280 U.S. 117, 122.¹⁴

Not every injury sustained necessarily enjoys redress in the courts. Insofar as this principle is applicable in Ohio, Judge Kennedy recently observed in *Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy* (C.A. 6, 1984), 740 F. 2d 1362, 1370:

The Ohio courts have never held that the 'open court' provision in its constitution prevents the legislature from abolishing a cause of action. In *Lafferty v. Shinn*, 38 Ohio St. 46, 48 (1882), the Ohio Supreme Court stated, that, under the provision, 'it is not within the power of the legislature to abridge the period within which an existing right may be so asserted as that there shall not remain a reasonable time within which an action may be commenced.' This reasoning, however, applies, only to 'existing' rights; state law determines when rights exist.

¹⁴ Cf. *Rosenberg v. North Bergen* (1972), 61 N.J. 190, 199-200, 293 A. 2d 662, 667, wherein the court reasoned:

"* * * [The statute] does not bar a cause of action [based upon a vested right]; its effect, rather, is to prevent what might otherwise be a cause of action, from ever arising. Thus injury occurring more than ten years after the negligent act allegedly responsible for the harm, forms no basis for recovery. The injured party literally has no cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress. The function of the statute is thus rather to define substantive rights than to alter or modify a remedy. The Legislature is entirely at liberty to create new rights or abolish old ones as long as no vested right is disturbed."

Section 16 guarantees a 'remedy by due course of law' for 'an injury done,' but state law determines what injuries are recognized and what remedies are available. See *Building Service & Maintenance Union Local No. 47 v. St. Lukes Hospital*, 11 Ohio Misc. 218, 227 N.E. 2d 265, 271 (C.P. Cuyahoga Cty. 1967).

"The Ohio Supreme Court has long held that causes of action may be abolished:

[']No one has a vested right in rules of the common law. Rights of property vested under the common law cannot be taken away without due process, but the law itself as a rule of conduct may be changed at the will of the legislature unless prevented by constitutional limitations. The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to new circumstances.[']

"*Fassig v. State ex rel. Turner*, 95 Ohio St. 232, 248, 116 N.E. 104 (1917). More recently, the Court repeated, "There is no question that the legislative branch of the government, unless prohibited by constitutional limitations, may modify or entirely abolish common law actions and defenses," *Thompson v. Ford*, 164 Ohio St. 74, 79, 128 N.E. 2d 111 (1955)."

The majority fails to discuss any abolition of a vested right, so it proceeds to find under Section 16, Article I, a right of access of the courts for virtually any claim. However, it is clear to me that unless the right is vested, or the claim involves a *fundamental right*, access to the courts may be limited and/or regulated by the General Assembly if a rational basis exists for the limitation. Accord *Bounds v. Smith* (1977), 430 U.S. 817; *United States v. Kras* (1973), 409 U.S. 434; *Boddie v. Connecticut* (1971), 401 U.S. 371. Nothing in Section 16, Article I suggests otherwise.¹⁵

¹⁵ In an attempt to rationalize today's holding with the enactment of R.C. 2305.29, wherein the General Assembly abolished the common-law causes of action for criminal conversation and alienation of affections, the majority

I would stress that the question presented this day is not novel, since an examination of decisions from this and other jurisdictions demonstrates that various statutes of repose have come under attack under the precise theory advanced by the majority. Although a few jurisdictions have found similar statutes violative of constitutional provisions,¹⁶ the vast majority of cases have concluded that statutes of repose do not violate "open court" provisions of state constitutions.¹⁷

reasons that the enactment of R.C. 2305.29 is not a violation of Section 16, Article I, "because the denial of remedy did not reach injury to *person, property, or reputation*." (Emphasis *sic*.) It reaches this innovative result, purportedly on the basis of *Haskins v. Bias* (1981), 2 Ohio App. 3d 297, 2 OBR 329, 441 N.E. 2d 842, a court of appeals opinion from Lucas County. Interestingly, the *Haskins* court stressed that Section 16, Article I only provides remedies for "wrongs that are recognized by law." *Id.* at 299, 2 OBR at 331, 441 N.E. 2d at 844. Since suits involving alienation of affections had come under severe criticism and were eventually abolished by R.C. 2305.29, the court concluded that the common-law action no longer represented an interest in land, goods, person, or reputation "such as may be recognized by law." *Id.* For the majority to simply conclude that an action alleging alienation of affections did not reach injury to person or reputation is nothing less than judicial legerdemain.

¹⁶ See, e.g., *Overland Constr. Co. v. Sirmons* (Fla. 1979), 369 So. 2d 572; *Saylor v. Hall* (Ky. 1973), 497 S.W. 2d 218.

¹⁷ See, e.g., *Twin Falls Clinic & Hospital Building Corp. v. Hamill* (1982), 103 Idaho 19, 644 P. 2d 341; *Beecher v. White* (Ind. App. 1983), 447 N.E. 2d 622; *Burmaster v. Gravity Drainage District No. 2* (La. 1978), 366 So. 2d 1381; *Anderson v. Wagner* (Miss. 1981), 402 So. 2d 320; *McMacken v. State* (S.D. 1982), 320 N.W. 2d 131; *Reeves v. Ille Electric Co.* (1976), 170 Mont. 104, 551 P. 2d 647; *Lamb v. Wedgewood South Corp.* (1983), 308 N.C. 419, 302 S.E. 2d 868; *Hargett v. Limberg* (D. Utah 1984), 598 F. Supp. 152; *Dunn v. St. Francis Hosp., Inc.* (Del. 1979), 401 A. 2d 77; *Valentine v. Thomas* (La. App. 1983), 433 So. 2d 289, certiorari denied (1983), 440 So. 2d 728; *Colton v. Dewey* (1982), 212 Neb. 126, 321 N.W. 2d 913; *Walker v. Santos* (1984), 70 N.C. App. 623, 320 S.E. 2d 407; *Harrison v. Schrader* (Tenn. 1978), 569 S.W. 2d 822; *Dague v. Piper Aircraft Corp.* (1981), 275 Ind. 520, 418 N.E. 2d 207; *Harmon v. Angus R. Jessup Assoc.* (1981 Tenn.), 619 S.W. 2d 522; *Stephens v. Snyder Clinic Assoc.* (1981), 230 Kan. 115, 631 P. 2d 222; *Hill v. Fitzgerald* (1985), 304 Md. 689, 501 A. 2d 27.

Without a question, today's holding creates a constitutional dilemma of severe proportions. This court has informed the General Assembly it has no power to meet what it perceives as an epidemic crises with responsive legislation. Who would have imagined that when *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St. 3d 111, 5 OBR 247, 449 N.E. 2d 438, was decided that the groundwork was being laid for declaring all statutes of repose constitutionally infirm?

Is an undiscovered claim for damages a constitutional right inviolate against legislative limitation as to time constraints? Does Section 16, Article I forever provide a remedy to an as yet undiscovered claim? To suggest, as does the majority, that every common-law right is indelibly embedded in the Ohio Constitution and that subjective awareness of a potential claim is required prior to the abolishment of a cause of action is sheer legal fiction. Nevertheless, because the majority disagrees with the time constraints under R.C. 2305.11(B), it has, under the guise of judicial interpretation, abrogated the function of the General Assembly and the electorate by amending the Constitution of Ohio by judicial fiat.

The empathy that all of us have for one suffering illness or injury has fostered a sense of irresponsibility born of sympathy, since the majority tacitly concedes that there are sound public policy considerations for a statute of repose of reasonable duration. The present predicament that the medical profession and health care facilities have in obtaining malpractice insurance at a reasonable cost will rapidly spread to other professions. Whether one is attracted to the concept or not, modern-day tort liability is premised upon spreading the cost of monetary losses through the medium of insurance. Insurance companies are not in business to sustain losses and thus they will not accept a risk where their exposure is incalculable on the basis of actuarial analysis. Today we have simply taken the insurance industry "out of play" in many areas of professional malpractice. Suffice it to say, I am deeply disappointed with the acumen and foresight of my brethren in the majority.

Thus I vigorously dissent from the rationale espoused by the majority.

MARKUS and HOLMES, JJ., concur in the foregoing opinion.

HOLMES J., concurring in judgment, but dissenting to the syllabus law and the opinion.

I am in agreement with the judgment of the majority here because it comports with this court's holding in *Deskins v. Young* (1986), 26 Ohio St. 3d 8, 26 OBR 7, 496 N.E. 2d 897. There we held that R.C. 2305.11(B) would not bar a claim, as here, which arose prior to July 28, 1975, but was discovered subsequent to the effective date of the statute. Although I strongly dissented in *Deskins*, such is unfortunately the law of Ohio and, based upon the principle of *stare decisis*, I shall adhere to that law as applied to this case.

As to the syllabus law in the present case and the body of the majority opinion, I adopt in the main what has been stated in dissent by Justice Wright. I wish to additionally point out that I have previously written on my sentiments as to the constitutionality of the four-year statute of repose as contained in R.C. 2305.11(B). As early as my commentary in *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St. 3d 111, 118, 5 OBR 247, 253, 449 N.E. 2d 438, 444 (Holmes, J., dissenting in part), I concluded that the discovery rule was meritorious for Ohio, as it would apply to R.C. 2305.11(A). However, as I then stated, the public policy of the state had been expressed by the General Assembly as it related to the need for a statute of repose in medical malpractice actions and had resulted in enactment of R.C. 2305.11(B). This act of the legislative body of Ohio was carried out after a specific pronouncement of a medical malpractice crisis in this state, and upon a multitude of legislative hearings declaring this to be the public policy of Ohio. This court, in determining that such legislation is unconstitutional, not only carries out a needless task, but it sets itself apart as a super legislative body usurping the very constitutional prerogatives of the General Assembly.

APPENDIX B

**IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT**

No. 85AP-1087

CARL E. HARDY, M.D.

Plaintiff-Appellant,

v.

VICTOR R. VERMEULEN, M.D., et al.,

Defendants-Appellees.

**Appeal from The Franklin County Court
of Common Pleas**

Whiteside, J.

Plaintiff, Carl E. Hardy, appeals from a judgment of the Franklin County Court of Common Pleas and raises four assignments of error as follow:

"1. The lower court, in relying upon R.C. 2305.11(B), has deprived Plaintiff-Appellant of a substantive property interest without due process of law under the Fourteenth Amendment to the United States Constitution and without due course of law under Section 16, Article I of the Ohio Constitution.

"2. The trial court erred in retroactively applying R.C. 2305.11(B), as amended, because Plaintiff-Appellant's cause of action accrued prior to the effective date of the amendment and Plaintiff-Appellant did not have a reasonable time to enforce his claim.

"3. The trial court erred in dismissing Plaintiff-Appellant's cause of action pursuant to R.C. 2305.11(B) for the reason that the statutory provision violates the

rights of persons to equal protection of laws as guaranteed by the United States and Ohio Constitutions.

"4. The trial court erred in applying R.C. 2305.11(B) as interpreted in *Opalko v. Marymount Hospital, Inc.* (1984), 9 Ohio St. 3d 63, to the case *sub judice* because the Ohio Supreme Court in *Opalko* did not specifically address issues relating to the 'discovery rule,' and furthermore, the decision of the lower court is in direct conflict with *Mckee v. Williams* (June 11, 1985), No. 84AP-759, unreported (1985 Opinions 1641), rendered by the Tenth District Court of Appeals."

Plaintiff brings this action founded in medical malpractice against defendants Victor R. VerMeulen, M.D., and Victor R. VerMeulen, M.D., Inc. In his complaint, plaintiff alleges in part:

"The physician-patient relationship of the parties to this action extended from 1972 through 1974. The malpractice injury which is the subject matter of this action was discovered April 15, 1984. * * *"

The action was commenced on October 1, 1985, but the complaint alleges that notice, in accordance with R.C. 2305.11(A), was given permitting an additional one hundred eighty days for bringing the action.

In 1974, R.C. 2305.11 required an action founded in medical malpractice to be commenced within one year of the accrual of the cause of action, which one-year period commenced to run upon termination of the physician-patient relationship. *Wylar v. Tripi* (1971), 25 Ohio St. 2d 164. Accordingly, plaintiff was then required to bring his action no later than the end of 1975. R.C. 2305.11 was amended effective July 1975 to include a provision in R.C. 2305.11(A) extending the limitation period for up to one hundred eighty days if notice of intent to bring the action be given within one-year limitation period. At that time, R.C. 2305.11(B)

was also enacted to create a statute of repose with respect to medical malpractice claims, providing as follows:

"In no event shall any medical claim against a physician * * * be brought more than four years after the act or omission constituting the alleged malpractice occurred. The limitations in this action for filing such a malpractice action against a physician * * * apply to all persons regardless of legal disability and notwithstanding section 2305.16 of the Revised Code * * *."

Accordingly, plaintiff's claim would have been barred not only by the basic statute of limitation, even as extended by giving notice, but also by application of R.C. 2305.11(B), if valid and applicable, no later than 1978, nearly seven years prior to the commencement of this action in 1985.

The situation is complicated, however, by the overruling of *Wyler v. Tripi*, *supra*, by *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St. 3d 111, and the substitution of a discovery rule for the prior termination rule with respect to the accrual and commencement of the running of the statute of limitations applicable to medical malpractice claims, the syllabus of *Oliver* stating as follows:

"Under R.C. 2305.11(A), a cause of action for medical malpractice accrues and the statute of limitations commences to run when the patient discovers, or, in the exercise of reasonable care and diligence should have discovered, the resulting injury. (*Gillette v. Tucker*, 67 Ohio St. 106; *Bowers v. Santee*, 99 Ohio St. 361; *Amstutz v. King*, 103 Ohio St. 674; *DeLong v. Campbell*, 157 Ohio St. 22 [47 O.O. 27]; *Lundberg v. Bay View Hospital*, 175 Ohio St. 133 [23 O.O.2d 416]; *Wyler v. Tripi*, 25 Ohio St. 2d 164 [54 O.O.2d 283], and all other inconsistent cases, overruled.)"

The issues before us are, accordingly, twofold: First, whether the effect of *Oliver* is to resurrect a medical malpractice claim barred both by the statute of limitations of R.C.

2305.11(A) and the statute of repose of R.C. 2305.11(B) at the time of the decision in *Oliver* (June 8, 1983); and, secondly, whether R.C. 2305.11(B) is valid and applicable to plaintiff's claim. In *Meros v. University Hospitals* (1982), 70 Ohio St. 2d 143, the Supreme Court expressly held that the absolute four-year limitation of R.C. 2305.11(B) is applicable to a medical malpractice claim accruing prior to the effective date of R.C. 2305.11(B), even though the running of the statute of limitations was tolled at that time pursuant to R.C. 2305.16 because the plaintiff therein was under a disability.

Ordinarily, an amendment to a statute of limitations extending the period of limitations does not apply with respect to a claim already extinguished by operation of the then existing statute of limitations. See *Cox v. Dept. of Transportation* (1981), 67 Ohio St. 2d 501, at 505, where it is stated as follows:

"Appellee may not invoke the amended version of R.C. 2743.16 to breathe new life into her cause of action because her claim has already been extinguished by operation of the former statute of limitations. Thus, on February 7, 1979, the effective date of amended R.C. 2743.16, the appellee no longer had a viable cause of action. * * *"

It would appear that the same rule would reasonably apply to a court decision changing the rule with respect to the time of accrual of causes of action, and such court decision would not have the effect of breathing new life into causes of actions extinguished by operation of the former court decisions overruled by the new decisions. Thus, we would conclude that, since plaintiff's claim had been extinguished and barred by the applicable statute of limitations construed in accordance with *Wyler v. Tripi, supra*, for some seven years at the time of the decision in *Oliver*, that decision should not be deemed to have the effect of breathing new life into plaintiff's case.

However, the Eighth District Court of Appeals reached a contrary conclusion in *Orbral v. Fairview General Hospital*

(1983), 13 Ohio App. 3d 57, holding that *Oliver* is retrospective in its operation and applies to claims for medical malpractice occurring prior to the decision in *Oliver*. Although the decision in *Orbral* is distinguishable both because the claim was timely brought under the termination rule and because it was pending in the court of appeals at the time of the *Oliver* decision, the general principals set forth in *Orbral* arguably would also apply to a claim regardless of how long it had been since the performance of medical services and termination of the physician-patient relationship, subject only to the statute of repose in R.C. 2305.11(B), which is the subject of this action.

Although we may disagree with the *Orbral* decision, we need not predicate our determination herein upon that principal, since we conclude that R.C. 2305.11(B) is applicable under the facts of this case.

Plaintiff points out that, in *Adams v. Sherk* (1983), 4 Ohio St. 3d 37, the Supreme Court held R.C. 2305.11(B) not to apply to a cause of action arising prior to the effective date of the statute with respect to a medical malpractice claim subject to the foreign object discovery rule of *Melnyk v. Cleveland Clinic* (1972), 32 Ohio St. 3d 198. *Melnyk* modified *Wylar* to the extent that a claim for medical malpractice does not accrue until the discovery of the negligence with respect to a foreign object negligently left in a patient's body during surgery. The reasoning of the *Adams* court was that, to apply R.C. 2305.11(B) under such circumstances, would allow retroactive application to the statute to destroy an accrued substantive right. Here, however, the application of R.C. 2305.11(B) would not destroy an accrued substantive right of plaintiff since his claim was time-barred by R.C. 2305.11(A), as construed in accordance with *Wylar, supra*, within one year after enactment of R.C. 2305.11(B).

Accordingly, even assuming that application of R.C. 2305.11(B) may be questionable with respect to claims not previously extinguished by application of the *Wylar* decision to R.C. 2305.11(A), at the time of the decision in *Oliver* in

1983, we find no prejudice to any constitutional right of plaintiff to apply R.C. 2305.11(B) to his claim, even assuming that *Oliver* should be construed as retroactively applying to acts of medical malpractice occurring prior to the time of the *Oliver* decision. In other words, even assuming that *Oliver* should be retroactively or retrospectively applied to acts of malpractice occurring before the date of that decision, it should not be retroactively applied to claims for medical malpractice barred by application of the statute of repose of R.C. 2305.11(B), that is, a medical malpractice claim involving an act or omission which occurred more than four years prior to June 8, 1983, even if not discovered until thereafter.

In reaching this conclusion, we are not unmindful of the decision in *Clark v. Hawkes Hospital* (1984), 9 Ohio St. 3d 182, wherein *Oliver* was applied to a medical malpractice claim involving an act or omission occurring prior to the *Oliver* decision. However, in that case, there was no discussion of application of R.C. 2305.11(B), nor any discussion whether the decision in *Oliver* would operate to resurrect claims barred at the time of the *Oliver* decision by the operation of R.C. 2305.11(A), as previously construed, as well as by application of R.C. 2305.11(B). Furthermore, in *Baird v. Loeffler* (1982), 69 Ohio St. 2d 533, the Supreme Court applied the four-year repose limitation of R.C. 2305.11(B) to a claim of a minor, which arose prior to the effective date of R.C. 2305.11(B), but commenced more than four years after such effective date. Although the *Baird* court referred to the plaintiffs therein having had a year after such effective date to bring the action, pursuant to the limitation of R.C. 2305.11(A), arguably, the full four-year period of repose set by R.C. 2305.11(B) should be available after the effective date thereof with respect to claims founded upon acts or omissions occurring prior to such effective date.

In reaching this conclusion, we are not unmindful of the decision in *Smith v. Loeffler* (1984), 20 Ohio App. 3d 66, in which the Ninth District Court of Appeals held the four-year limitation of R.C. 2305.11(B) not to operate to bar a claim for medical malpractice arising prior to the effective date of the

amendment to R.C. 2305.11 but discovered thereafter, relying upon *Adams v. Sherk*, *supra*. However, in *Smith*, the action was timely brought even under the termination rule since the physician-patient relationship continued for six years involving follow-up care for radiation treatments allegedly negligently administered.

In this case, the physician-patient relationship ended in 1974. Amended R.C. 2305.11, including R.C. 2305.11(B), became effective in July 1975. Plaintiff's claim was barred by application of R.C. 2305.11, at the latest in July 1979, four years after the effective date of R.C. 2305.11(B). Nearly four years later, in June 1983, *Oliver* abolished the termination rule and established the discovery rule for the accrual of a cause of action for medical malpractice for statute of limitations purposes. Plaintiff finally discovered the malpractice in April 1984 and commenced this action in October 1985, nearly eleven years after both the occurrence of the act or omission allegedly constituted in the malpractice and the termination of the physician-patient relationship.

R.C. 2305.11(B) is a statute in repose conferring a substantive right upon a physician not to be liable for an alleged act or omission constituting malpractice more than four years after the occurrence thereof. To give retroactive effect to the decision in *Oliver* to recreate a cause of action in plaintiff for a claim which had been barred by operation of R.C. 2305.11(B) for nearly four years at the time of the decision in *Oliver* would be to defeat the substantive right conferred upon defendant. Clearly, the legislative intent of R.C. 2305.11(B) is that a physician cannot be held responsible for an act or omission constituting malpractice more than four years after the occurrence thereof. To engraft a discovery rule with respect to claims already barred by R.C. 2305.11(B) is contrary to the express legislative intent.

Turning specifically to the assignments of error, none of them are well-taken. R.C. 2305.11(B) has not deprived plaintiff to his substantive right since R.C. 2305.11(A) as it existed at the time of the effective date of R.C. 2305.11(B) would have operated to bar any claim by plaintiff no later than the

end of 1975, one year after the termination of the physician-patient relationship under the construction of that statute, which continued until the decision in *Oliver* in 1983. The first assignment of error is not well-taken.

As to the second assignment of error, R.C. 2305.11(B) can be applied only prospectively to plaintiff's claim, the only distinction being whether the entire four-year period should be afforded after the effective date thereof. It makes no difference in this case, however, since plaintiff did not commence this action until more than ten years after the effective date of R.C. 2305.11(B). The second assignment of error is not well-taken.

Nor has plaintiff been denied the equal protection of the law by operation of R.C. 2305.11(B). The effect of *Oliver* as contended by plaintiff would be to invalidate R.C. 2305.11(B), except possibly in those cases wherein the malpractice is discovered within three years after the act or omission and the claimant is under a disability tolling the running of the statute pursuant to R.C. 2305.16. We do not so interpret *Oliver*. Rather, *Oliver* found it within the power of the court to adopt a discovery rule in lieu of the prior termination rule established by *Wyller, supra*, specifically noting that it was the court, not the legislature, that created the termination rule for accrual of a medical malpractice cause of action. However, R.C. 2305.11(B) establishes the time for the commencement of the running of the statute with respect to the four-year limitation set forth therein and, thus, the time of the commencement of the running of the period after which any claim for medical malpractice will be barred. The *Oliver* court, however, did not find that the prior termination rule established in *Wyller* denied equal protection of the law to any plaintiff. In *Vance v. St. Vincent Hospital* (1980), 64 Ohio St. 2d 36, the Supreme Court recognized the type of situation giving rise to plaintiff's claim of denial of equal protection and, notwithstanding such situations, applied R.C. 2305.11(B). In the opinion, Justice Sweeney stated in part at 41:

"It can readily be seen that, prior to the adoption of R.C. 2305.11(B), a medical malpractice action could, under certain circumstances, be timely filed many years after the malpractice itself occurred, for the reason that the patient's cause of action does not necessarily accrue simultaneously with the act or omission constituting the malpractice. * * *

"We do not believe the purpose of the General Assembly in adopting R.C. 2305.11(B) while leaving R.C. 2305.11(A) virtually unchanged was to alter this court's prior interpretations of the medical malpractice statute of limitations, but, rather, was to establish, as a rule of general applicability, a maximum period of four years from the alleged malpractice itself within which a potential plaintiff must bring his action irrespective of the date on which his cause of action accrued. * * *"

The *Vance* court, however, did not determine the constitutionality of R.C. 2305.11(B), which is raised herein. Nevertheless, under the circumstances herein, plaintiff has not been denied equal protection of the law, even assuming that there may be circumstances under which application of R.C. 2305.11(B) could constitute a denial of equal protection. As noted above, R.C. 2305.11(B) would operate to bar plaintiff's claim at the latest nearly four years before the Supreme Court abolished the termination rule and adopted the discovery rule in *Oliver*. Furthermore, in *Opalko v. Marymont Hospital, Inc.* (1984), 9 Ohio St. 3d 63, the Supreme Court found R.C. 2305.11(B) not to be violative of equal protection with respect to a minor. The third assignment of error is not well-taken.

Similarly, the fourth assignment of error is not well-taken since the trial court did not improperly apply the opinion in *Opalko, supra*. Even though *Opalko* may not be dispositive of the equal protection issue raised herein predicated upon the discovery rule announced in *Oliver*, no prejudice has resulted from the trial court's reliance thereon for the reasons stated above.

For the foregoing reasons, all four assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

MOYER, P.J. and NORRIS, J., concur.

APPENDIX C

**IN THE
SUPREME COURT OF OHIO
COLUMBUS**

1987 TERM
To wit: October 7, 1987
Case No. 86-1448

CARL E. HARDY, M.D.,
Plaintiff-Appellant,

v.

VICTOR R. VERMEULEN, M.D., et al.,
Defendants-Appellees.

REHEARING ENTRY

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied

/s/ THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 7th day of October, 1987.

MARCIA J. MENGEL, CLERK
/s/ RITA A. JACKSON, DEPUTY

APPENDIX D

SUPREME COURT OF VIRGINIA

No. 870265

**SCHOOL BOARD OF THE CITY
OF NORFOLK, ET AL.**

V.

**UNITED STATES GYPSUM
COMPANY, ET AL.**

**Appeal-Statement: On a Question of Law Certified By the
United States District Court for the Eastern District of Vir-
ginia, Norfolk Division, Walter E. Hoffman, Judge.**

Slip Opinion, September 4, 1987

Opinion by Justice Richard H. Poff

Pursuant to Acts 1985, c. 620, and Acts 1986, cc. 250, 646, the people of this Commonwealth, at the general election held November 4, 1986, ratified an amendment to Va. Const. art. VI, § 1, which vested this Court with original jurisdiction "to answer questions of state law certified by a court of the United States or the highest appellate court of any other state." By order entered January 16, 1987, we amended the Rules of this Court by adding Rule 5:42 which is appended to the foot of this opinion.

As contemplated by Rule 5:42(a) and (e), we entered an order March 18, 1987, accepting for consideration a question of law certified to us by orders entered in the above-captioned case by the United States District Court for the Eastern District of Virginia, Norfolk Division. The certification orders fully comply with the requirements of Rule 5:42(c) and (d),

and we look to those orders for the facts and circumstances underlying the question certified.

As stated in the certification orders, the City of Norfolk and the School Board of the City of Norfolk (the plaintiffs) filed a civil complaint on June 27, 1986, seeking:

compensatory and punitive damages, allegedly sustained in inspecting, analyzing, containing, removing and replacing asbestos-containing products which they claim were placed in certain school buildings between 1939 and 1971.

The complaint, containing fifteen counts, demanded judgment against the manufacturers of the asbestos products, U.S. Gypsum, National Gypsum Company, W. R. Grace & Co. (the defendants), and Pfizer, Inc. At the time the question was certified to this Court, the complaint had been reduced to six counts claiming restitution, negligence, breach of express warranties, breach of implied warranties, fraud, and unfair trade practices. By stipulation, Pfizer, Inc., has been dismissed as a party-defendant.

In answer to the complaint, the defendants contended that the cause of action asserted by the plaintiffs was extinguished by Code § 8.01-250.¹ In response, the plaintiffs contended that this statute merely barred the right of action, and that Code § 8.01-250.1 as amended effective April 6, 1986 by Acts 1986, c. 458,² revived the right of action and extended the fil-

¹ In relevant part, Code § 8.01-250 provides as follows:

No action to recover for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, shall be brought against any person performing or furnishing the design, planning surveying, supervision of construction, or construction of such improvement to real property more than five years after the performance of furnishing of such services and construction.

² Code § 8.01-250.1 provides in full:

Notwithstanding the provisions of § 8.01-234 or any other section in

ing deadline to July 1, 1990. By rejoinder, the defendants filed a motion for partial summary judgment, contending that § 8.01-250 vests them with a property interest³ and that § 8.01-250.1 violates that part of the due process clause of the Constitution of Virginia, which provides that "no person shall be deprived of his . . . property without due process of law".

WHETHER THE APPLICATION OF VA. CODE § 8.01-250.1 TO THE FACTS PRESENTED HERE IS UNCONSTITUTIONAL UNDER THE DUE PROCESS CLAUSE OF ARTICLE I, SECTION 11 OF THE CONSTITUTION OF VIRGINIA.

In oral argument before this Court, the defendants advocated the affirmative of the question and the plaintiffs the negative. Although the question as certified does not implicate the federal Constitution, the plaintiffs argue that the due process clause of the Fourteenth Amendment and the due process clause of the Virginia Constitution are coextensive and, hence, that decisions of the United States Supreme Court are relevant to determination of the certified question. They cite *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 311 (1945), where the Court said:

this chapter, every action against a manufacturer or supplier of asbestos or material containing asbestos brought by or on behalf of any agency of the Commonwealth incorporated for charitable or educational purposes; counties, cities or towns; or school boards, to recover for (i) removal of asbestos or materials containing asbestos from any building owned or used by such entity, (ii) other measures taken to correct or ameliorate any problem related to asbestos in such building or (iii) reimbursement for such removal, correction or amelioration which would otherwise be barred prior to July 1, 1990, as a result of expiration of the applicable period of limitation, is hereby revived or extended. Any action thereon may be commenced prior to July 1, 1990.

³ Code § 8.01-250 applies to manufacturers of building materials. *Cape Henry v. Natl. Gypsum*, 229 Va. 596, 331 S.E.2d 476 (1985).

Finding that the issue framed by the parties "may be determinative in this case" and that it is controlled by the Constitution and laws of this Commonwealth, the federal district court has certified the following question:

In *Campbell v. Holt*, [115 U.S. 620 (1885)], this Court held that . . . a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar.

See also *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 243-44 (1976).

These decisions support the plaintiffs' view that "statutes of limitation are procedural in nature" and that "there are no vested rights in procedural statutes" for purposes of the Fourteenth Amendment. But the federal decisions are inapposite to our inquiry. Code § 8.01-250 is not a procedural statute.

An ordinary statute of limitations is a procedural statute, one which creates a temporal bar to the maintenance of a legal remedy arising out of an accrued cause of action. Code § 8.01-250 is not a statute of limitations. In *Virginia Military Institute v. King*, 217 Va. 751, 758, 232 S.E.2d 895, 899 (1977), the plaintiff argued that the statutory precursor of Code § 8.01-250 was "the applicable statute of limitations". In response to that argument, we said:

We do not agree. That statute sets an outside limit within which the applicable statutes of limitation operate. Its purpose is . . . to establish an arbitrary termination date after which no litigation of the type specified may be initiated.

Id.

Although "statutes of limitations" and "statutes of repose" are terms sometimes loosely employed as interchangeable, they are, in fact, different in concept, definition, and function. As a general rule, the time limitation in a conventional statute of limitations begins to run when the cause of action accrues. We are of opinion the General Assembly intended Code § 8.01-250 to be a statute of repose. The time limitation in such a statute begins to run from the occurrence of an event unrelated to the accrual of a cause of action, and the

expiration of the time extinguishes not only the legal remedy but also all causes of action, including those which may later accrue as well as those already accrued. *Cheswold Vo. Fire Co. v. Lambertson Const.*, 489 A.2d 413, 421 (Del. 1985); see also Restatement (Second) of Torts § 899, comment q (1979). Conceptually, statutes of repose reflect legislative decisions that:

as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability. Thus a 'statute of repose' is intended as a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights.

Stevenson, Products Liability and the Virginia Statute of Limitations — A Call for the Legislative Rescue Squad, 16 U. Rich. L. Rev. 323, 334 n.38 (1982). See generally McGovern, The Variety, Policy and Constitutionality of Product Liability Statutes of Repose, 30 Am. U. L. Rev. 579 (1981).

As a statute of repose, Code § 8.01-250 is a redefinition of the substantive rights and obligations of the parties to any litigation "arising out of the defective and unsafe condition of an improvement to real property". Specifically, we think the lapse of the statutory period was meant to extinguish all the rights of a plaintiff, including those which might arise from an injury sustained later, see *Deaconess Home Assn. v. Turner Constr.*, 14 Ohio App. 3d 281, 283-84, 470 N.E.2d 950, 954 (1985), and to grant a defendant immunity from liability for all the torts specified in the statute, see *Harris v. Clinton Corn Processing Co.*, 360 N.W.2d 812, 816 (Iowa 1985).

The defendants contend that this legislative grant of immunity is a vested right and that they cannot be divested of that right by a statute enacted after the statutory period has expired.⁴ It is immaterial to our decision whether this right is characterized as "vested" or as "substantive".

⁴ The defendants insist that, even if Code § 8.01-250 is denominated a statute of limitations, once the period of limitations has expired, the right to

This Court has consistently held that the due process clause of the Virginia Constitution protects not only rights that have vested, but also substantive property interests which may ripen into vested rights. In *Shiflet v. Eller*, 228 Va. 115, 319 S.E.2d 750 (1984), the question on appeal was whether a tort-feasor's potential right to contribution from a joint tort-feasor was entitled to due process protection. We noted that such a right does not vest until one of the tort-feasors has paid an unfair share of the common obligation. We concluded that the right, although inchoate, is substantive, and we held that " 'substantive' rights, as well as 'vested' rights, are included within those interests protected from retroactive application of statutes", *id.* at 120, 319 S.E.2d at 753, because "[s]uch a retroactive application . . . would violate . . . due process rights and would be invalid", *id.* at 121, 319 S.E.2d at 754.

Later, applying the rule in *Shiflet*, we said that "the retroactive application of a statute impairing a 'substantive' right violates due process and is therefore unconstitutional." *Potomac Hospital Corp. v. Dillon*, 229 Va. 355, 360, 329 S.E.2d 41, 45, cert. denied, 474 U.S. 971 (1985). More recently in *Bartholomew v. Bartholomew*, 233 Va. 86, 353 S.E.2d 752 (1987), we held that:

the ability of the non-settling tort-feasor to be released with the plaintiff has released another joint wrongdoer", i.e., the right to invoke a defense, is also a substantive right and that the retroactive application of a statute impairing that right was "constitutionally invalid."

Id. at 91, 353 S.E.2d at 755, 756.

Like the rights of those joint tort-feasors (which arose when the tort was committed), the rights bestowed by Code § 8.01-250 upon the defendants in this case (which arose

assert the defense of the statute is a vested right. Although we recognize the logic of that argument, see *Johnson v. Gill*, 68 Va. (27 Gratt.) 587, 595 (1876) (*dicta*); *Kesterson v. Hill*, 101 Va. 739, 45 S.E. 288 (1903); *Strickland v. Simpkins*, 221 Va. 730, 734, 272 S.E.2d 539, 541 (1981), we need not decide that question.

when the statutory period expired) are substantive if not vested and, as such, may not be impaired by retroactive application of Code § 8.01-250.1.

The plaintiffs seem to assume that any legislative act which facilitates governmental efforts to reduce a hazard to public health, safety, morals, or general welfare is exempt from constitutional constraints. True, all legislative enactments are entitled to a presumption of constitutionality, but a statute premised upon the police power "is subject to the constitutional guarantee that no property shall be taken without due process of law and where the police power conflicts with the Constitution the latter is supreme". *Board of Supervisors v. Carper*, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959). "[T]he police power is 'elastic'. But its stretch is not infinite. If it were, no property right, indeed, no personal right, could co-exist with it." *Bd. Sup. James City County v. Rowe*, 216 Va. 128, 139, 216 S.E.2d 199, 209 (1975); accord *Cupp v. Board of Supervisors*, 227 Va. 580, 594-96, 318 S.E.2d 407, 414-15 (1984); see also *Nollan v. California Coastal Commission*, U.S., 107 S.Ct. 3141 (1987).

We agree that, subject to constitutional guarantees, the legislature's police power includes the power to enact a statute reasonably designed to protect society against the health hazard posed by asbestos products installed in buildings frequented by the public at large. See *Alford v. Newport News*, 220 Va. 584, 260 S.E.2d 241 (1979). But Code § 8.01-250.1 is not such a statute.

As the plaintiffs say, current Environmental Protection Agency regulations "require school districts to remove asbestos materials prior to any substantive renovation or demolition of a building." Without the benefit of the revival statute, the cost of compliance with these regulations would have to be paid out of the public treasury. It appears, therefore, that the revival statute was designed primarily, not to relieve the hazard to public health, but to relieve budgetary concerns. Such a statute cannot survive the defendants' due process challenge, and we reject the plaintiffs' police power argument.

On brief, the plaintiffs raise other issues. Specifically, they argue that the fraudulent-concealment count alleged in their complaint seeks equitable relief; that Code § 8.01-250, the statute of repose, does not apply to that count because laches is the only bar to a suit in equity; and, hence, that their complaint was timely filed. Further, they contend that their action at law for fraud was timely filed because, they say, the running of the five-year period specified in the statute of repose is tolled by the alleged fraudulent concealment.

Because both issues are patently outside the compass of the question certified, we will not notice either. Responding definitively to the question before us, we hold that the application of Code § 8.01-250.1 to the facts presented in the orders of certification is unconstitutional under the due process clause of Va. Const. Art. I, § 11.

Whiting, J., dissenting.

APPENDIX

Rule 5:42 Certification Procedures

(a) Power to Answer. — The Supreme Court may in its discretion answer questions of law certified to it by the Supreme Court of the United States, a United States court of appeals for any circuit, a United States district court, or the highest appellate court of any state or the District of Columbia. Such answer may be furnished, when requested by the certifying court, if a question of Virginia law is determinative in any proceeding pending before the certifying court and it appears there is no controlling precedent on point in the decisions of the Supreme Court or the court of Appeals of Virginia.

(b) Method of Invoking. — This Rule may be invoked only by an order of one of the courts referred to in section (a). No party litigant in the foregoing courts may file in the Supreme Court a petition or motion for certification.

(c) Contents of Certification Order. — A certification order shall set forth:

(1) the nature of the controversy in which the question arises:

(2) the question of law to be answered;

(3) a statement of all facts relevant to the question certified;

(4) the names of each of the parties involved;

(5) the names, addresses, and telephone numbers of counsel for each of the parties involved;

(6) a brief statement explaining how the certified question of law is determinative of the proceeding in the certifying court; and

(7) a brief statement setting forth relevant decisions, if any, of the Supreme Court and the Court of Appeals of Virginia and the reasons why such decisions are not controlling.

(d) Preparation of Certification Order. — The certification order shall be prepared by the certifying court, signed by the presiding justice or judge, and forwarded to the Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the certified question. The Supreme Court may in its discretion restate any question of law certified or may request from the certifying court additional clarification with respect to any question certified or with respect to any facts.

(e) Notification of Acceptance or Rejection. — The Supreme Court, in its discretion, may decide whether to answer any certified question of law. The Supreme Court will notify the certifying court and counsel for the parties of its decision to accept or to reject any certified question of law. A notice accepting a question will include a briefing schedule and, if oral argument is permitted by the Supreme Court, a tentative date and the length of time allowed for such argument.

(f) Revocation of Acceptance. — The Supreme Court, in

its discretion, may revoke its decision to answer a certified question of law at any time. Upon deciding to revoke, the Supreme Court will notify the certifying court and counsel for the parties of its action.

(q) Costs of Certification. — Fees and costs shall be the same as in civil appeals docketed in the Supreme Court and shall be paid as ordered by the certifying court in its order of certification.

(h) Briefs. — The form, length, and time for submission of briefs shall comply with Rules 5:26 through 5:34 *mutatis mutandis*.

(i) Opinion. — A written opinion of the Supreme Court stating the law governing each question certified will be rendered as soon as practicable after the submission of briefs and after any oral argument. The opinion will be sent by the clerk under the seal of the Supreme Court to the certifying court and to counsel for the parties and shall be published in the Virginia Reports.

Certified question answered in the affirmative.



NO. 87-1108

Supreme Court, U.S.

FILED

FEB 3 1988

JOSEPH F. SPANGL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

VICTOR R. VERMEULEN, M.D., and
VICTOR R. VERMEULEN, M.D., INC.,
Petitioners,

vs.

CARL E. HARDY, M.D.,
Respondent.

**BRIEF OF AMICUS CURIAE OHIO
HOSPITAL ASSOCIATION IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT**

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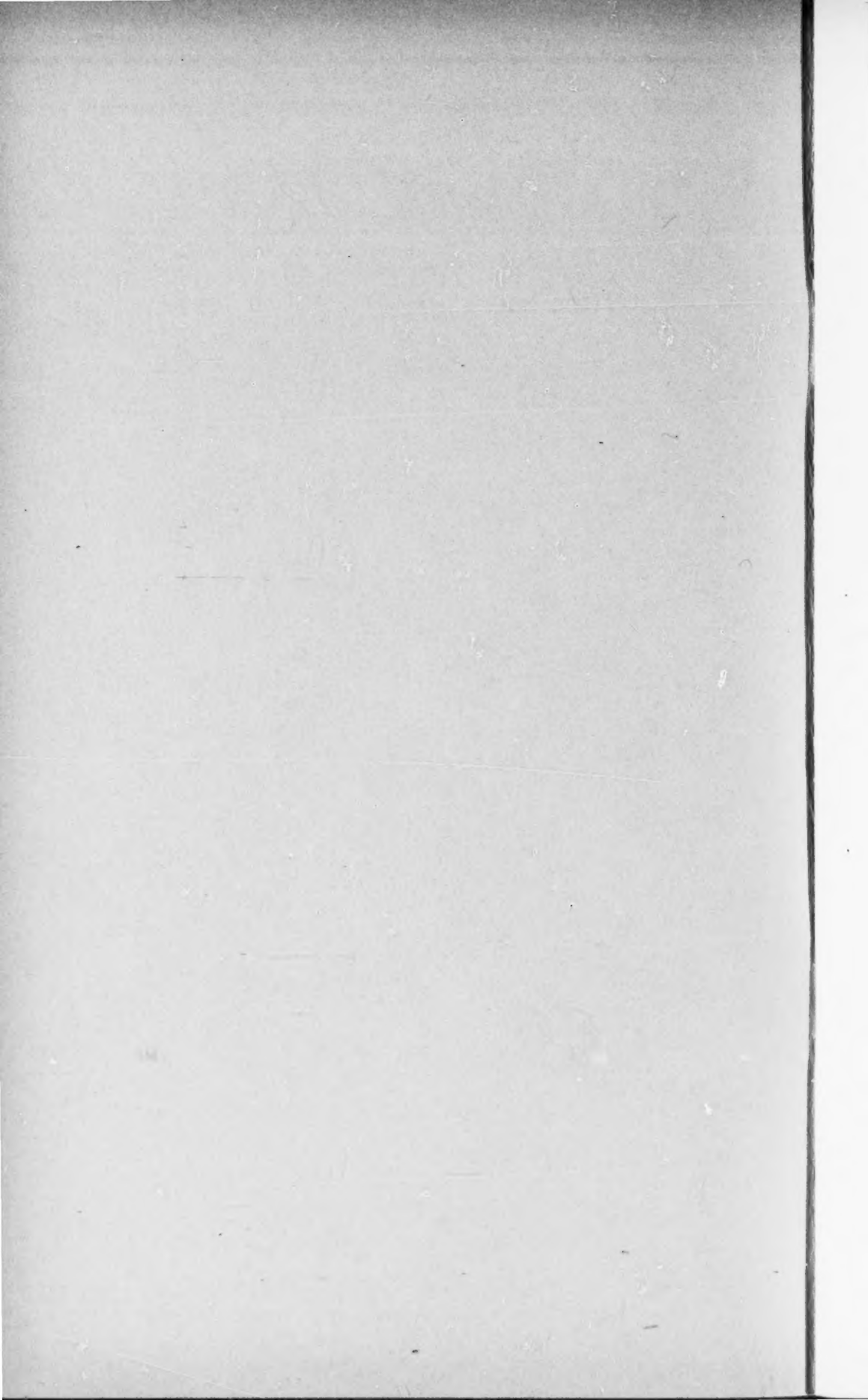


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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

No. 87-1108

VICTOR R. VERMEULEN, M.D., and
VICTOR R. VERMEULEN, M.D., INC.,
Petitioners,
vs.
CARL E. HARDY, M.D.,
Respondent.

**BRIEF OF AMICUS CURIAE OHIO
HOSPITAL ASSOCIATION IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT**

Amicus Curiae Ohio Hospital Association supports Petitioners Victor R. VerMeulen, M.D., and Victor R. VerMeulen, M.D., Inc., petition for a writ of certiorari to review the judgment and opinion of the Ohio Supreme Court in this case.

**CONSENT OF THE PARTIES TO THE FILING OF BRIEF
BY AMICUS CURIAE OHIO HOSPITAL ASSOCIATION**

Pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States, the parties to this action hereby consent to the filing of a brief by Amicus Curiae Ohio Hospital Associa-

tion in support of the Petition for a Writ of Certiorari prior to consideration of the Petition for a Writ of Certiorari.

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INTEREST OF AMICUS CURIAE OHIO HOSPITAL ASSOCIATION

Amicus Curiae Ohio Hospital Association is an Ohio non-profit corporation with over two hundred (200) member hospitals in the state of Ohio. The Ohio Hospital Association is vitally interested in all matters of public policy which will have a significant impact on the quality, availability or cost of health care in Ohio.

The decision in this case rendered by the Ohio Supreme Court will adversely affect the quality, availability and cost of health care in Ohio. The Ohio Supreme Court's holding that Ohio Rev. Code § 2305.11(B) violates Section 16, Article I of the Ohio Constitution, and the Ohio Supreme Court's application of that holding and its prior holding in *Oliver v. Kaiser Community Health Foundation*, 5 Ohio St. 3d 111, 449 N.E. 2d 438 (1983), to retroactively reopen a cause of action long barred under the statute of limitations and prior decisional law will have a substantial adverse effect on all hospitals and health care consumers in the state of Ohio, as set forth in further detail in the Argument of Amicus Curiae Ohio Hospital Association.

For these reasons, the Ohio Hospital Association respectfully submits that the interest of its members in this case is substantial, and that the Brief of Amicus Curiae Ohio Hospital Association sets forth facts for the Court's consideration which are of relevancy to the disposition of this case.

SUMMARY OF ARGUMENT

This case arises out of medical treatment provided by Petitioner Victor R. VerMeulen, M.D. ("Dr. VerMeulen") to Respondent Carl E. Hardy, M.D. ("Dr. Hardy") in early 1973, during the course of a physician-patient relationship which terminated in early 1974. Under the statute of limitations and all caselaw interpreting it which was in effect during the relevant time period and for many years thereafter,

the statute of limitations on Dr. Hardy's claim began to run in 1974, and expired one year thereafter, in 1975. The Ohio Supreme Court decision which Petitioners seek to have reviewed by their Petition for a Writ of Certiorari had the effect of reopening the statute of limitations and permitting Dr. Hardy's action to be brought, notwithstanding the fact that such action had been barred by the expiration of the statute of limitations some ten years earlier.¹

In this brief, Amicus Curiae Ohio Hospital Association will argue that the Ohio Supreme Court's decision is of broad general application to all medical malpractice cases in Ohio and will have the effect of eliminating any definitive, meaningful limitations period relative to such cases. Furthermore, Amicus Curiae Ohio Hospital Association will argue that the retroactive application of that decision to all cases previously barred under Ohio Rev. Code § 2305.11 will result in flooding the courts with cases long thought barred, the defense of which will be extremely difficult due to the passage of time. The decision of the Ohio Supreme Court and its retroactive application to cases barred under previous caselaw is in violation of the due process clause, U.S. CONST. amend. XIV, § 1.

Finally, Amicus Curiae will argue that the Ohio Supreme Court's decision will result in a severe destabilization of the

¹ The Ohio Supreme Court also remanded this action to the Court of Common Pleas for further action. In late December, 1987, Respondent attempted to voluntarily dismiss the action without prejudice in the Court of Common Pleas, and now takes the position that such voluntary dismissal renders the Petition for a Writ of Certiorari moot. Respondent's action to dismiss this case has no effect on this appeal. Pursuant to Ohio Rev. Code § 2305.19, Respondent's dismissal without prejudice is not a final disposition of this case because Respondent may refile such action within one year of the dismissal. To hold that such dismissal renders the Petition for a Writ of Certiorari moot would deprive Petitioners of their right to petition this court for review, and bind them under the Ohio Supreme Court's holding in any refiled action. Principles of due process mandate that the losing party retain the right to request review from a higher court until the time for making such a request or filing an appeal has run.

medical malpractice insurance market reflected in soaring premium costs and availability problems which will threaten the very foundations of our health care delivery system, to the serious detriment of health care providers and health care consumers alike in Ohio.

ARGUMENT

THE DECISION OF THE OHIO SUPREME COURT IN THIS CASE, AND THE RETROACTIVE APPLICATION THEREOF TO CASES BARRED UNDER PRIOR CASELAW, EFFECTIVELY ABOLISHES ANY DEFINITIVE LIMITATIONS PERIOD AND JEOPARDIZES A DEFENDANT'S ABILITY TO DEFEND AGAINST A MEDICAL MALPRACTICE CLAIM, IN VIOLATION OF THE DUE PROCESS CLAUSE, U.S. CONST. AMEND. XIV, § 1.

Prior to July 28, 1975, the statute of limitations in Ohio for medical malpractice claims, Ohio Rev. Code § 2305.11, required that a cause of action in medical malpractice be brought within one year after the cause accrued. The operative word in the statute, "accrued", had long been defined by the Ohio courts as that point in time when the relationship between the physician and the patient was terminated. *Wyler v. Tripi*, 25 Ohio St. 2d 164, 267 N.E. 2d 419 (1971); *Gillette v. Tucker*, 67 Ohio St. 106, 65 N.E. 865 (1902). The only statutory exception to this one year rule was that the statute was tolled for persons who, at the time of accrual, were minors or were suffering from some other legal disability, until the person reached the age of majority or until the disability was removed. Ohio Rev. Code § 2305.16. One further exception was created by court decision: in the case of a foreign object left in a patient's body during surgery, the statute was tolled until the foreign object was discovered. *Melnyk v. Cleveland Clinic*, 32 Ohio St. 2d 198, 290 N.E. 2d 916 (1972).

Years of sound public policy decisions by the legislature, and reasoned applications of those same policies by the Ohio courts resulted in a system which remained exceedingly stable for many decades. However, in the early 1970's, rapid and large increases in both the number of malpractice claims and the size of awards caused a national crisis in the malpractice insurance market. This crisis, characterized by soaring

premiums and the unavailability of coverage at any cost to certain high risk medical specialties and institutions, threatened to add greatly to already high health care costs and to force certain providers of health care services to high risk cases out of the health care business entirely. This crisis is one which has been well documented by various commentators. See, e.g., U.S. Dep't. of Health, Education and Welfare, *Report of the Secretary's Commission on Medical Malpractice* (1973); Sheehan, *The Medical Malpractice Crisis: How It Happened and Some Proposed Solutions*, 11 Forum 80 (1975); Nat'l. Conference of St. Legislatures, *A Legislator's Guide to the Medical Malpractice Issue* (1976); A.B.A., *Report of the Commission on Medical Professional Liability* (1977).

Ohio was not immune from this crisis, and by 1975 Ohio health care providers faced an increasing refusal of insurance carriers to write medical malpractice coverage, and a dramatic increase in premiums charged by those carriers which continued to write policies. Some carriers continued to write policies, but excluded those specialists such as neurologists and anesthesiologists who were viewed as "high risk". The result was potentially devastating to the health care system. Rates for medical services began to steeply increase as a result of soaring malpractice premiums. Many health care providers, especially those in the "high risk" specialties, began to seriously contemplate discontinuance of services, or the limitation of their practices to less risky cases. Some institutions faced the choice of going forward without coverage or restricting their services. See Comment, *Malpractice and the Statute of Limitations in Ohio*, 10 Cap. U. L. Rev. 711 (1981); Gouldin & Gouldin, *The Medical Malpractice Insurance Crisis*, 3 Ohio N.U.L. Rev. 510 (1975).

In mid-1975, amid much debate and after long months of careful consideration, the Ohio General Assembly enacted Am. Sub. H.B. 682, 111th General Assembly, 136 Laws of Ohio H682 (eff. 7-28-75), which was designed to ease the growing malpractice crisis. The bill, as enacted, was a com-

promise which took into consideration the position of many different groups representing the insurance industry, health care providers and the plaintiff's bar. One of the key provisions of Am. Sub. H.B. 682 was a revision of the malpractice statute of limitations to enact a four year statute of repose. Ohio Rev. Code § 2305.11(B). This new statute of repose created an absolute limitation on actions in medical malpractice of four years after the *occurrence* of the alleged act of malpractice, regardless of the date the cause of action accrued. Furthermore, the four year absolute limitation was made applicable to all persons regardless of legal disability, with a limited exception for minors under the age of ten, which exception gave them until their fourteenth birthday to bring an action.

Beginning in 1983, a series of Ohio Supreme Court decisions turned upside-down both the long-standing prior decisions of that court interpreting the malpractice statute of limitations and the 1975 legislative changes enacted in response to the malpractice crisis. See *Oliver v. Kaiser Community Health Foundation*, 5 Ohio St. 3d 111, 449 N.E. 2d 438 (1983); *Schwan v. Riverside Methodist Hospital*, 6 Ohio St. 3d 300, 452 N.E. 2d 1337 (1983); *Opalko v. Marymount Hospital, Inc.*, 9 Ohio St. 3d 63, 458 N.E. 2d 847 (1984); *Mominee v. Scherbarth*, 28 Ohio St. 3d 270, 503 N.E. 2d 717 (1986); *Frysinger v. Leech*, 32 Ohio St. 3d 38, 512 N.E. 2d 337 (1987); *Hardy v. VerMeulen*, 32 Ohio St. 3d 45, 512 N.E. 2d 626 (1987); and *Hershberger v. Akron City Hospital*, 34 Ohio St. 3d 1, 516 N.E. 2d 204 (1987). The net result of these sweeping changes in decisional law is that Ohio currently has no definitive, predictable, or even meaningful statute of limitations on medical malpractice actions, and the Ohio General Assembly may not be able to structure a workable new statute of limitations within the constitutional parameters defined by these decisions.

The current malpractice statute of limitations in Ohio is as follows: an action in medical malpractice may be brought within one year after the cause accrues. "Accrual" is defined as the later of that point in time when the patient discovers or

reasonably should have discovered the resulting injury, or the physician-patient relationship is terminated. *Frysinger v. Leech, supra*. For purposes of determining when the resulting injury is or should have been discovered, the Ohio Supreme Court has adopted a complicated three-pronged test which requires multiple factual determinations to apply. *Hershberger v. Akron City Hospital, supra*. The result is that a statute of limitations defense to a medical malpractice action in Ohio will be nearly impossible to raise successfully without the benefit of a trier of fact.

Thus, under current decisional law, providers of medical treatment in Ohio are, theoretically, *forever* subject to the threat of suit. There is absolutely no way to calculate, with any reasonable assurance of accuracy, a definite time period after which they are free from the threat of suit. Perhaps more importantly from the perspective of the public interest, medical malpractice insurers will no longer be able to reasonably predict their potential liability, with the result of soaring malpractice insurance premiums and availability problems which have the potential to far overshadow the malpractice crisis of the 1970's. Such a scenario can only seriously jeopardize our health care delivery system as we know it today.

In the face of these problems, medical malpractice insurers have no way to adequately predict long term liability, and must assume a high potential liability and reserve accordingly, a necessary practice which leads to higher premiums. However, in the early 1970's insurers found that, despite this practice, claims often exceeded reserves, and were forced to increase premiums drastically to cover the difference. It is reasonable to assume that malpractice insurers in Ohio are likely to experience the same problems in the future.

The economic impact of the 1970's crisis on hospitals was potentially staggering. Over the three year period from 1970 to 1972, premium costs for basic liability coverage for hospitals increased approximately 50 percent. Among other things, this upward trend in premiums reflects a drastic in-

crease in the number of claims against hospitals. Between 1967 and 1970, the number of claims against hospitals increased by 75 percent. U. S. Dep't. of Health, Education and Welfare, *Report of the Secretary's Commission on Medical Malpractice* (1973), at 610. However, as noted by the American Bar Association, the enormous increase in premiums was just the tip of the iceberg:

It is likely that the costs of insuring against medical liability will continue to rise, and that the proportion of costs now assessed against hospitals . . . will increase . . . Multi-defendant claims, which almost always involve a hospital as one defendant, constitute 43 percent of all claims filed but almost 75 percent of all loss dollars paid. If substantial numbers of physicians decline to purchase insurance due to escalating costs, the larger financial resources of the hospital will inevitably be called upon to "bail out the doctor" in a multi-party suit situation.

A.B.A., *Report of the Commission on Medical Professional Liability* (1977), at 29.

There is evidence that the affordability of malpractice insurance is again being affected by soaring claims and awards. Richards, *Malpractice Losses Are Building — Again*, Hospitals, September 16, 1984, at 108. While coverage in some form is still available to most providers, most malpractice insurance carriers have, in the last several years, discontinued occurrence type policies in favor of claims made policies.² The effect of this shift is to force providers to continue to purchase "tail" coverage after they have ceased offering services (and ceased earning an income therefrom), or risk uninsured claims against them. The Ohio Supreme Court decision will only serve to increase drastically the cost of all

² An occurrence type policy provides coverage for any claim which is based upon an occurrence during the policy period regardless of when the claim is made. Claims made policies only cover claims made during the policy period.

medical malpractice coverage, including "tail" coverage, both because of the increased future risk to insurance companies, and because of unanticipated losses on old occurrence type policies. Such costs are, of course, passed on to the consumer in the form of a higher price for health care services.

The problems created by retroactive application of the Ohio Supreme Court decision to reopen cases long thought barred, as was done in this case, are even more frightening. There is the potential for the courts to be flooded with cases long barred under prior caselaw, and based upon treatment rendered years and even decades earlier — cases for which the malpractice insurers have not reserved and which the defendants no longer recall.

If the Ohio Supreme Court is permitted to apply the current interpretation of the malpractice statute of limitations retroactively to cases long barred under prior interpretations, as was done in this case, claims could be brought based upon treatment rendered and relationships terminated decades before. With today's rapidly changing modern medical science, not only do memories fade, records become lost, and facts become stale over years and decades of time, but medical standards may change so dramatically that it is often difficult to reconstruct what the standard of care was decades ago, and patently unfair to apply today's standard to treatment rendered a generation earlier. Thus, a defendant's ability to defend against such a claim is severely hampered by the passage of time, until, at some point, the problems of proof reach such proportions as to deprive the defendant entirely of the ability to defend against these claims.

The problem is probably best illustrated by a comparison of medical malpractice claims with automobile accident liability claims. In the case of an automobile accident liability claim, there is a specific point in time where a known, identifiable and reportable incident occurs, i.e. an auto accident. Although the parties may not know at the time the accident occurs whether it was negligently caused, and may not even

know the extent of their injuries, there is no question that an accident occurred and that they do know many facts which will form the basis of any eventual claim: e.g. the time and place of the accident, the number of vehicles involved, the number of persons involved and their ages, and the circumstances surrounding the accident. An accident report is generally made to the police department, and a claim filed with the respective insurance companies. The insurance companies are then in a position to investigate further, evaluate potential claims, and reserve funds and adjust premiums as necessary to accommodate any action which might later be brought. Likewise, potential defendants are in a position to record their impressions for use in defense of a subsequent claim against them.

Contrast, for example, the case of a malpractice claim against a physician and hospital which arises out of injury to a child allegedly sustained at birth. In such a case, the hospital likely provided a multitude of services over a period of days to the infant and its mother during and shortly after birth, and then never saw the child or its parents again. Neither the hospital nor its insurer had any way of knowing if the child sustained some injury as a result of the services rendered until the child or its representative decided to pursue a claim. With rare exceptions, there is generally no specific, identifiable incident—no “accident” to report at the time medical treatment occurs. If a claim is not brought for many years, and neither the hospital nor the insurer is on notice of a potential claim, and there is no way to assure that records are preserved and memories are recorded. Moreover, the hospital must rely on the recall of its employees who assisted in the delivery and treated the newborn infant to supplement whatever written record is available, employees who may not be readily identifiable or reasonably located many years after the event.

In such a case, the child's mother will typically sincerely believe she remembers, with great clarity, everything that took place in the delivery room on that very important day in

her life, despite the fact that her recall has probably been colored by the comments and experience of others described to her over the years. The physician, on the other hand, has delivered hundreds and perhaps thousands of infants in the years since the delivery in question. He is unlikely to have any personal recall of that particular birth, and the medical records of the pregnancy and delivery may or may not be still available, depending on the amount of time which has lapsed. However, no matter how detailed available records may be, in order to adequately defend the case, the records will inevitably have to be supplemented by the physician's own recall of his practices and procedures at the time in question, if not his recall of the specific case. Thus, in the case of many of these stale claims, problems of proof become so severe that the due process normally afforded by the courts is rendered meaningless.

Overall, the Ohio Supreme Court's decision and the retroactive application of that decision and others to cases long barred under prior case law will effectively eliminate any meaningful statute of limitations on medical malpractice claims in Ohio, and seriously impair a defendant's ability to reconstruct the facts of a case and defend against stale claims, in violation of the due process clause. U.S. CONST. amend XIV, § 1. Retroactive application will also make it nearly impossible for an insurance company to adequately reserve for future losses, dramatically increase the cost and jeopardize the availability of medical malpractice insurance, and increase health care costs and threaten the viability of our health care delivery system as we know it today. The impact of this decision will ultimately be felt by all health care providers and health care consumers in the State of Ohio.

CONCLUSION

For these reasons, Amicus Curiae Ohio Hospital Association urges the Court to review the judgment of the Ohio Supreme Court.

Respectfully submitted,

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